TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 118.

C. W. CORNELL AND F. B. CORNELL, COPARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF CORNELL BROTHERS, PLAINTIFFS IN ERROR,

vs.

F. E. COYNE, LATE UNITED STATES COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF ILLINOIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 18, 1902.

(18,649.)

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(18,649.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1903.

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a Circuit Court of the United States, Northern District of Illinois, Northern Division.

C. W. CORNELL and F. B. CORNELL, Co-partners Doing Business under the Name and Style of Cornell Brothers,
vs.
F. E. COYNE, Late Collector of Internal Revenue, First District of Illinois.
} 26300. Assumpsit.

Mr. Lewis F. Mason, Mr. William E. Mason, Mr. C. W. Greenfield, attorneys for C. W. Cornell and F. B. Cornell, co-partners, etc.
Mr. S. H. Bethea, United States district attorney for the northern district of Illinois, Mr. Oliver E. Pagin, attorneys for F. E. Coyne, late collector of internal revenue for first district of Illinois.

1 *Præcipe for Record.*

Circuit Court of the United States, Northern District of Illinois, Northern Division.

C. W. CORNELL and F. B. CORNELL, Co-partners, etc.,
vs.
F. E. COYNE, Late Collector of Internal Revenue, First District of Illinois.
} 26300.

To the clerk of the above entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States, under the writ of error heretofore allowed by said court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Præcipe for summons,
Summons and return,
Declaration,
Demurrer,
Judgment of July 1, 1902,
Bill of exceptions,
Petition for writ of error,
Assignment of error,
Order of August 12, 1902, allowing writ of error,
Bond on writ of error,
Clerk's certificate,
Original writ of error,
Original citation.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court and on file in the office of the clerk of the Supreme Court at Washington, before the 11th day of September, 1902.

MASON & MASON,
C. W. GREENFIELD,
Attorneys for Appellants.

(Endorsed:) Filed Aug. 15 1902 Marshall E. Sampsell clerk

2 Pleas in the circuit court of the United States for the northern district of Illinois—northern division, begun and held at the United States court room, in the city of Chicago, in said district and division, before the Hon. Christian C. Kohlsaat, district judge of the United States for the northern district of Illinois, on Tuesday, the first day of July, in the year of our Lord one thousand nine hundred and two, being one of the days of the regular December term of said court, 1901, and of our Independence the one hundred and twenty-sixth year.

MARSHALL E. SAMPSELL, *Clerk.*

3 C. W. CORNELL and F. B. CORNELL, Co-partners Doing Business under the Firm Name and Style of Cornell Brothers,
vs.
F. E. COYNE, Late United States Collector of Internal Revenue, First District of Illinois. } 26300.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division.*

Be it remembered that on this day to-wit: the seventeenth day of May, 1902, came the plaintiffs, C. W. Cornwell and F. B. Cornell, co-partners doing business as Cornell Bros., by their attorneys, Mason and Mason and C. W. Greenfield, and filed in the clerk's office of said court their præcipe for summons in words and figures following to-wit:

4 *Præcipe for Summons.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

Circuit Court, June Term, A. D. 1902.

C. W. CORNELL and F. B. CORNELL, Co-partners Doing Business as Cornell Bros.,
vs.
F. E. COYNE, Late United States Collector of Internal Revenue, First District of Illinois. } In —. Damages, $20,000.

The clerk of said court will issue a summons in said cause to said defendants, in a plea of trespass on the case on promises to the damage of said plaintiffs in the sum of twenty thousand dollars, direct the same to the United States marshal for said district to execute, and make it returnable to the June term of said court, 1902.

Dated this 17th day of May, A. D. 1902.

MASON & MASON.
C. W. GREENFIELD.

To S. W. Burnham, Esq., clerk.

(Endorsed:) Filed May 17, 1902, Marshall E. Sampsell, clerk.

And on the same day to-wit: the 17th day of May, 1902, a writ of summons issued out of the clerk's office of said court, directed to the marshal of said district to execute, which summons together with the marshal's return thereon endorsed is in the words and figures following to-wit:

5 CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon F. E. Coyne, late United States collector of internal revenue, first district of Illinois, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof to be holden at Chicago, in the district aforesaid, on the first Monday of July next to answer unto C. W. Cornell and F. B. Cornell, co-partners doing business as Cornell Bros., of a plea of trespass on the case upon promises, to their damage, as is alleged, of twenty thousand dollars, *dollars*, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the [SEAL.] United States of America, at Chicago, aforesaid, this 17th day of May in the year of our Lord one thousand nine hundred and two.

MARSHALL E. SAMPSELL, *Clerk.*

6 *Marshal's Return.*

I have served this writ within my district as follows to wit:
By reading the same to and within the presence and hearing of F. E. Coyne, late United States collector of internal revenue first district of Illinois, on May 22nd, 1902.

JOHN C. AMES, *U. S. Marshal,*
By THOMAS H. CURRIER, *Deputy.*

(Endorsed:) Filed May 22, 1902, Marshall E. Sampsell, clerk.

And on to-wit: the 17th day of May, 1902, came the plaintiffs in said entitled cause by their attorney and filed in the clerk's office of said court their declaration in words and figures following to-wit:

7 *Declaration.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the Circuit Court of said District, June Term, A. D. 1902.

C. W. Cornell and F. B. Cornell, co-partners, doing business under the firm name and style of Cornell Brothers, of the city of Elgin, Kane county, in said district, by Mason & Mason and C. W. Greenfield, their attorneys, complain of F. E. Coyne, late United States collector of internal revenue first district of Illinois, of a plea of trespass on the case on promises.

For that whereas, on, towit: the 1st, day of August, A. D. 1897, in the town of Huntley, county of McHenry, towit: in said district, the plaintiffs were engaged in the business of manufacturing and selling a product known in commercial circles in foreign countries and in the internal revenue department of the United States, as filled cheese, and they have been engaged in such business at certain periods of each year from thence hitherto. And the plaintiffs aver that at various times subsequent to the said 1st, day of August, A. D. 1897, and prior to the 1st, day of April, A. D. 1901, the plaintiffs entered into various contracts in London and Liverpool, England, under and by the terms of which they agreed to manufacture at their said factory in the district aforesaid, certain large quantities of filled cheese, and export and deliver the same in Liverpool and London in the Kingdom of Great Britain, in certain fixed quantities and at certain

intervals and periods of time covered by and mentioned in said contracts; that no filled cheese was at any time after the said 1st day
8 of August, A. D. 1897, and prior to said 1st, day of April, A. D. 1901, manufactured by the plaintiffs in said district, or elsewhere, except under contracts made and entered into by the plaintiffs as aforesaid; and that under and in pursuance of said contracts plaintiffs did from time to time subsequent to the 1st, day of August, A. D. 1897, and prior to said 1st, day of April, A. D. 1901, manufacture large quantities of filled cheese, towit: 1,580,479 pounds thereof, all of which was shipped directly from plaintiffs' factory, in the district aforesaid, and exported by them to London and Liverpool, and the same was sold in and consigned direct to markets and countries wholly without the United States.

Plaintiffs further aver that during the entire period aforesaid, and for each year thereof, the plaintiffs complied with the internal revenue laws of the United States with reference to the payment of an annual manufacturers' tax, and the same was duly and promptly paid by the plaintiffs to the said internal revenue collector in and for the first district of the State of Illinois, at the time fixed by law for the payment of same. That under and by virtue of section 9, article 1, of the Constitution of the United States, the plaintiffs did not at any time during the said period, become liable to the United States Government, or to the said defendant as collector, to procure and attach any revenue stamps to said filled cheese or to the packages containing the said filled cheese so manufactured and exported by them under said contracts; nor did they at any time become liable to the said United States Government for any tax or duty thereon. That each quantity or installment of filled cheese manufactured, exported and delivered by the plaintiffs under said contracts, was forwarded by the plaintiffs as soon as the same was ready for shipment from their factory in said district, and prior to
9 the shipment thereof the plaintiffs applied to the defendant as such collector, for permission to ship and forward the same without purchasing and attaching to said filled cheese or to the said packages containing the said filled cheese, the revenue stamps required by an alleged act of Congress, approved June 6th, A. D. 1896, with reference to internal revenues; but notwithstanding the fact that such filled cheese was manufactured for export, and was about to be delivered by the plaintiffs for export and shipment to a foreign market, and notwithstanding the provisions of said section 9, article 1, of the Constitution of the United States, the defendant, assuming to act as such collector of the said internal revenue district, and assuming and pretending to act under and by virtue of said alleged act of Congress, approved June 6th, A. D. 1896, did, at various times during said period, and on the dates of shipment of said filled cheese, by force and duress, exact, demand and collect from the plaintiffs large sums of money amounting in the aggregate to, towit: $20,000, and upon the claim and under the pretext that the same was a general assessment as an internal revenue tax upon the said commodities. That the plaintiffs objected and protested against the said re-

quirement of said defendant, and contended that under the provisions of the Constitution aforesaid, plaintiffs were not required to place such revenue stamps upon the said commodity when manufactured for export and exported and sold in a foreign market; but notwithstanding said protests repeated threats were made by the defendant to arrest and prosecute the plaintiffs for a supposed violation of the said alleged act of Congress last mentioned, unless the plaintiffs would immediately procure and purchase revenue stamps as required
10 by said act and attach the same to the said packages before delivering the same to be forwarded in the manner aforesaid; and governed wholly by said threats of arrest and prosecution, and not otherwise, said plaintiffs did make a written requisition upon the defendant as said internal revenue collector, for internal revenue stamps to be attached by them to the packages of filled cheese included in each of the said shipments, which said revenue stamps amounted in the aggregate to a large sum of money, towit: the sum of $20,000, which said requisitions, and each of them, stated upon the face thereof in writing that the same was made by the plaintiffs under protest; and plaintiffs aver that revenue stamps were furnished to the plaintiffs by the said defendant as such collector under such requisitions, amounting to the sum aforesaid, which were paid for by the plaintiffs to said defendant upon delivery. That the said requisitions, and each of them, were made by the plaintiffs wholly by reason of the demands of the defendant, and by reason of the threats aforesaid, and not otherwise.

Plaintiffs aver that the requirements of the said defendant, whereby the plaintiffs were compelled in the manner aforesaid, to purchase and use the said revenue stamps, were wholly unauthorized and unwarranted by law; and that section 9, of the act of Congress aforesaid, and said act itself in that the same failed to contain provisions whereby filled cheese manufactured for export trade and exported and sold in foreign markets wholly without the United States, might be exported and sold free from the levy of any duty or tax thereon; or provision whereby the same might be freed from the force and effect of said act, are repugnant to said section
11 9, article 1, of the Constitution of the United States, and that this suit therefore, involves the construction or application of the Constitution of the United States.

And the plaintiffs aver that afterwards on, towit: the 8th, day of May, A. D. 1901, in pursuance of the requirements of section 3226, of the Revised Statute- of the United States, plaintiffs made an appeal in writing to the Commissioner of Internal Revenues, according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, demanding and requiring a refund or repayment to the plaintiffs of the said sum of money, which the plaintiffs had been unlawfully compelled to pay to the said internal revenue collector in the manner aforesaid. And afterwards such proceedings were had thereon, that the said Commissioner on, towit: the 6th, day of January, A. D.

1902, rendered a decision therein whereby the said claim was rejected.

By reason of which premises the defendant on, towit: the 6th, day of January, A. D. 1902, at Chicago, Illinois, towit: the district aforesaid, became and was liable to pay to the plaintiffs the said several sums of money on request, and being so liable then and there undertook and faithfully promised the plaintiffs well and truly to pay unto the plaintiffs the said several sums of money respectively on request; nevertheless the said defendant, although often requested so to do, has not as yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the plaintiffs, but to pay the same, or any part thereof, the defendant has hitherto altogether refused, and still does refuse to do to the damage of the plaintiffs in the sum of, towit: $20,000.

12 And for that whereas also, the defendant on, towit: the 6th, day of January, A. D. 1902, in the county of McHenry, towit: in the said district, was indebted to the plaintiffs in the sum of $20,000 for the payment by the defendant to the plaintiffs of the value of internal revenue stamps issued by the United States under the authority of law for the payment of internal revenue tax, and which the plaintiffs had been wrongfully, improperly and unnecessarily required by the defendant to purchase, use and cancel upon a certain commodity known as filled cheese, and manufactured by the plaintiffs for export trade, and which had theretofore been sold by them in foreign markets wholly without the United States, and which was ready to be delivered by the plaintiffs to be forwarded to be delivered in such foreign markets, at the time when the said internal revenue thereon had been wrongfully collected by the defendant; and being so indebted the defendant, in consideration thereof, then and there promised the plaintiffs to pay them the said sum of money on request.

And the plaintiffs aver that heretofore on, towit: the 8th, day of May, A. D. 1901, in pursuance of the requirements of section 3226, of the Revised Statutes of the United States, the plaintiffs made an appeal in writing to the Commissioner of Internal Revenues, according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, demanding and requiring a refund and repayment of the said sum of money, which the plaintiffs had been unlawfully compelled to so pay to the defendant in the manner aforesaid. And afterwards such proceedings were had thereon that the said Commissioner

13 on, towit: the 6th, day of January, A. D. 1902, rendered a decision therein whereby the said claim was rejected.

Yet the defendant, though requested, has not paid said sum of money, or any part thereof, to the plaintiffs, but refuses so to do; to the damage of the plaintiffs in a large sum of money, towit: the sum of $20,000.

And whereas also, the said defendant afterwards on, towit: the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiffs of and concerning divers other sums

of money, before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiffs in the further sum of $20,000 of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiffs, the said defendant in consideration thereof afterwards, towit: on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested etc.) has not paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of said plaintiffs of twenty thousand dollars ($20,000),
14 and therefore the said plaintiffs bring suit etc.

MASON & MASON,
C. W. GREENFIELD,
Plaintiffs' Attorneys.

15 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the Circuit Court of said District, June Term, A. D. 1902.

C. W. CORNELL ET AL.
vs.
F. E. COYNE, Late Collector, etc.

Bill of Particulars.

A detailed statement of the quantity of filled cheese manufactured by the plaintiffs under contracts previously made in London and Liverpool, England, for the manufacture thereof, to be forwarded and delivered at said London and Liverpool, at times and in quantities stated in said contracts, and which was shipped direct from plaintiffs' factory, where the same was made, to London and Liverpool, England, giving date of each shipment, number of packages, number of pounds contained in each shipment, and names of consignees and places where consigned and sold, and upon which plaintiffs were unlawfully required by the defendant to place internal revenue stamps in accordance with the provisions of the act of Congress, approved June 6th, A. D. 1896, with reference to internal revenues.

15½

Date shipped.	Packages.	Pounds.	Where and to whom sold.	
			Name.	Place of business.
1897.				
Sept. 7	50	3579	Cornell Bros	Liverpool.
10	300	21838	"	London.
23	364	26436	"	"
30	300	21731	"	"
Oct. 8	350	22514	"	"
20	300	21252	"	"
Nov. 11	350	24882	"	"
Dec. 2	350	24389	"	"
15	350	24949	"	"
29	350	25215	"	"
1898.				
Jan. 12	400	28571	"	"
26	400	28388	"	"
Feb. 9	400	28639	"	"
16	343	24527	"	"
M'ch 9	400	28345	"	"
23	400	28081	"	"
Apr. 6	400	28053	"	"
20	486	34784	"	"
Dec. 28	400	28637	"	"

Date shipped.	Packages.	Pounds.	Where and to whom sold.	
			Name.	Place of business.
1899.				
Jan. 11	400	28778	Cornell Bros.	London.
25	300	21295	"	"
Feb. 1	300	21439	"	"
15	300	21766	"	"
M'ch 1	419	30556	"	"
15	300	21741	"	"
29	350	25922	"	"
Apr. 12	300	22416	"	"
26	300	22286	"	"
May 10 *10*	200	14505	"	"
24	150	10645	"	"
June 8	313	22275	"	"
Dec. 20	350	21656	"	"
28	300	19316	W. D. Grant.	Liverpool.
1900.				
Jan. 10	317	22477	"	"
19	275	19716	"	"
Feb. 2	250	18170	"	"
9	262	18913	"	"
23	333	24165	"	"
M'ch 7	372	27100	"	"
21	300	21773	"	"
28	200	14426	"	"
Ap'l 4	200	14347	"	"
11	234	16416	"	"
18	211	13646	Cornell Bros.	London.
25	225	14650	"	"
May 2	191	12563	"	"
10	279	18017	"	"
Sept. 27	300	20913	"	Liverpool.
Oct. 11	400	28266	"	"
25	500	35129	"	"
Nov. 8	500	35519	"	"
22	500	34573	"	"
Dec. 6	500	35039	"	"
20	500	36485	"	"
16				
1901.				
Jan. 3	600	44268	"	"
17	600	44079	"	"
31	600	43550	"	"
Feb. 14	600	42850	"	"
21	500	35294	"	London.
28	500	35007	"	Liverpool.
M'ch 13	500	34582	"	London.
21	600	39140	"	Liverpool.

17 The following is a list of the requisitions respectively, for revenue stamps to be attached to the packages respectively, contained in the foregoing schedule, giving dates of each requisition, number of packages and value of stamps covered by each requisition.

Date of requisition.	Number of packages.	Value of stamps purchased.
1897.		
Sept. 7	50	35.79
10	300	218.38
22	364	264.36
29	300	217.31
Oct. 7	350	225.14
20	300	212.52
Nov. 10	350	248.82
Dec. 1	350	243.89
14	350	249.49
28	350	252.15
1898.		
Jan. 11	400	285.71
25	400	283.88
Feb. 8	400	286.39
14	343	245.27
M'ch 8	400	283.45
22	400	280.81
Apr. 5	400	280.53
19	486	347.94
Dec. 27	400	286.37
1899.		
Jan. 10	400	287.78
24	300	212.95
31	300	214.39
Feb. 14	300	217.66
28	419	305.56
M'ch 14	300	217.41
28	350	259.22
Ap'l 11	300	224.16
25	300	222.86
May 9	200	145.05
23	150	106.45
June 6	313	222.75
Dec. 12	350	216.56
27	300	193.16

Date of requisition.	Number of packages.	Value of stamps purchased.
1900.		
Jan. 9	317	224.77
		801883
		85778
18 Jan. 16		1111
31	275	197.16
Feb. 7	250	181.70
20	262	189.13
M'ch 6	333	241.65
20	372	271.00
27	300	217.73
Ap'l 3	200	144.26
10	200	143.47
17	234	164.16
24	211	136.46
May 1	225	146.50
9	191	125.63
Sept. 26	279	180.17
Oct. 9	300	209.13
23	400	282.66
Nov. 7	500	351.29
20	500	355.19
Dec. 4	500	345.73
18	500	350.39
1901.	500	364.85
Jan. 2	600	442.68
15	600	440.79
29	600	435.50
Feb. 12	600	428.50
19	500	352.94
26	500	350.07
M'ch 12	500	345.82
19	600	381.40
		7786.96
		4132
		1111

80.1883
7786.90

15805.73

(Endorsed:) Filed May 17, 1902. Marshall E. Sampsell, clerk.

19 And on to-wit: the 27th day of June, 1902, came the defendant in said entitled cause by S. H. Bethea, United States attorney for the northern district of Illinois and filed in the clerk's office of said court his certain demurrer to the declaration in words and figures following to-wit:

Demurrer.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division, of the May Adjourned Term, in the Year Nineteen Hundred and Two.

C. W. CORNELL and F. B. CORNELL, Co-partners,
vs.
F. E. COYNE, Late Coll'r Int. Rev., 1st Dist. Ill. } No. 26300. Assumpsit.

And the defendant, by S. H. Bethea, United States attorney for the northern district of Illinois, his attorney comes and defends etc., when, etc., and says that the said declaration, and each count thereof, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiffs to ma-ntain their aforesaid action, and that he, the defendant, is not bound by law to answer the same; and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiffs may be barred from maintaining their aforesaid action, etc.

S. H. BETHEA,
United States Attorney, Attorney for Defendant.

(Endorsed:) Filed June 27, 1902, Marshall E. Sampsell, clerk.

20 And on to-wit: the first day of July, 1902, in the December term of said court, 1901, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Judgment of July 1, 1902.

C. W. CORNELL, ETC.,
vs.
F. E. COYNE, Late United States Collector. } 26300. Assumpsit.

Now come the parties by their attorneys, and the demurrer to the declaration is heard and sustained, the plaintiffs electing to stand

by their pleadings. And thereupon, it is ordered, that the defendant have judgment upon his said demurrer, and that said cause be dismissed at the costs of the plaintiffs, and that execution issue therefor, the plaintiffs excepting to the ruling of the court and to the entry of this order enter their motion for a writ of error to the Supreme Court of the United States, which is allowed upon the plaintiffs giving bond in the penalty of three hundred dollars, and twenty days are allowed in which to present their bill of exceptions.

21 On the hearing of this cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following to-wit:

Bill of Exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

C. W. CORNELL & F. B. CORNELL, Co-partners Doing Business under the Firm Name and Style of Cornell Brothers,
vs.
F. E. COYNE, Late Collector of Internal Revenue, First District of Illinois.

Bill of exceptions.

Be it remembered that upon the hearing of the above entitled cause before the Honorable Christian C. Kohlsaat, in the May term, A. D. 1902, of said court on the 1st day of July, A. D. 1902, the following proceedings were had:

Appearances.

For plaintiffs—Messrs. Mason & Mason and C. W. Greenfield,
For defendant—Messrs. S. H. Bethea and O. E. Pagin.

The said cause having come on to be heard before the court upon the declaration therein and the demurrer of the defendant thereto, the defendant, by his counsel, moved the court to sustain the said demurrer to the said declaration, and the said motion of the defendant was thereupon allowed by the court and said demurrer to said declaration sustained; to which ruling of the court in granting defendant's said motion and in sustaining the demurrer
22 to the said declaration plaintiffs, by their counsel, then and there duly excepted.

And thereupon plaintiffs, by their counsel, elected to stand by their said declaration, whereupon defendant, by his counsel, moved the court to enter judgment in said cause against the plaintiffs and in favor of the defendant for costs of said suit, and said motion was

allowed and judgment was then entered by the court against the plaintiffs and in favor of the defendant for costs of said suit; to which ruling of the court in granting said motion of the defendant and in entering judgment against the plaintiffs and in favor of the defendant for costs of said suit, the plaintiffs, by their counsel, then and there duly excepted.

And for as much as the foregoing proceedings, matters and things do not otherwise fully appear of record in said cause the plaintiffs present this their bill of exceptions and pray that the same may be signed and sealed by the court and made a part of the record of said cause, which is done accordingly this 2nd day of July, A. D. 1902.

KOHLSAAT, *Judge.* [SEAL.]

O. K.
O. E. P.

(Endorsed:) Filed July 1, 1902, Marshall E. Sampsell, clerk.

23 And on to-wit: the 12th day of August, 1902, came the plaintiffs in said entitled cause by their attorney and filed in the clerk's office of said court their certain petition for writ of error in words and figures following to-wit:

Petition for Writ of Error.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the Circuit Court of the United States for the Northern District of Illinois.

C. W. CORNELL and F. B. CORNELL, Co-partners, etc.,
vs.
F. E. COYNE, Late United States Collector of Internal Revenue, First District of Illinois.
} Gen. No. 26300.

To the honorable the judge of said court:

C. W. Cornell and F. B. Cornell, co-partners, doing business under the firm name and style of Cornell Brothers, the plaintiffs in the above entitled cause, respectfully show that they are aggrieved by the rulings and orders entered and judgment rendered in the above entitled cause on the first day of July, A. D. 1902, and that there is manifest error in the record and judgment of said court, entered in said cause, apparent upon the record of said cause.

Wherefore, they pray that an order may be entered allowing the said plaintiffs to prosecute a writ of error to the honorable, the Supreme Court of the United States, under and according to the laws

of the United States in that behalf made and provided, that
24 an order may be entered fixing the amount of security which said plaintiffs shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court may be suspended, superseded and stayed until the determination of said writ of error by the United States Supreme Court; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court.

And your petitioners will ever pray.

MASON & MASON,
C. W. GREENFIELD,
Attorneys for Plaintiff.

Petition granted & writ of error allowed Aug. 12, 1902

JAS. G. JENKINS,
U. S. Circuit Judge.

(Endorsed:) Filed August 12, 1902, Marshall E. Sampsell, clerk.

25 And on to-wit: the 12th day of August, 1902, came the plaintiffs in said entitled cause by their attorney and filed in the clerk's office of said court their certain assignment of errors in words and figures following to-wit:

Assignment of Errors.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the Circuit Court of the United States for the Northern District of Illinois.

C. W. CORNELL & F. B. CORNELL, Co-partners Doing Business under the Firm Name and Style of Cornell Brothers,
vs.
F. E. COYNE, Late United States Collector of Internal Revenue, First District of Illinois.
} Gen. No. 26300.

Assignment of errors.

Come now the plaintiffs in the above entitled cause in the July term of this honorable court, and say:

That in the record of this cause and in the rulings of the Honorable Christian C. Kohlsaat, judge of the circuit and district courts of the United States in and for the northern district of the State of Illinois, and of the seventh judicial circuit of the United States, presiding at the hearing of said cause, and in the rulings of the said judge upon the demurrer to the declaration theretofore filed in said

cause, and the motion of the defendant to sustain said de-
26 murrer to said declaration, and the ruling and action of the said judge in entering judgment in said cause against the *the* plaintiffs and in favor of the defendant, the said plaintiffs, in connection with their petition for a writ of error, make the following assignment of errors upon which they will rely in their prosecution of the said writ of error in the above entitled cause.

I.

That the said court erred in sustaining the said demurrer of the defendant to the plaintiffs' declaration filed in said cause.

II.

That the said court erred in rendering judgment against said plaintiffs and in favor of the defendant in said cause.

III.

The said court so erred in sustaining the demurrer of the defendant to the plaintiffs' declaration, and in entering judgment in favor of the defendant and against the plaintiffs, for the following reasons, to wit:

(*a.*) The said court, in sustaining the said demurrer to the said declaration, and in entering judgment in the said cause in favor of the defendant and against the plaintiffs, in effect held that goods manufactured in the United States expressly for export to a foreign country, under a contract previously made in such foreign country for the manufacture and export thereof, are subject to the payment of an internal revenue tax thereon, notwithstanding the provisions of section 9, article 1, of the Constitution of the United States.

27 (*b.*) The said court in sustaining the said demurrer to the said declaration, and in entering judgment thereon against the plaintiffs and in favor of the defendant, in effect held that section 9, of the act of Congress, approved June 6th, A. D. 1896, with reference to internal revenues, and which is entitled "An act defining cheese, also imposing a tax upon and regulating the manufacture, sale importation and exportation of 'filled cheese,'" and the said act itself were not repugnant to section 9, article 1, of the Constitution of the United States in that the same failed to contain provisions whereby filled cheese manufactured for export trade and exported and sold in foreign markets wholly without the United States, might be exported and sold free from the levy and payment of any duty or tax thereon.

(*c.*) The said court, in sustaining the said demurrer to said declaration, and in entering judgment thereon against the plaintiffs and in favor of the defendant, in effect held that section 9, of the act of Congress, approved June 6th, A. D. 1896, with reference to internal revenues, and which is entitled "An act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation

and exportation of 'filled cheese,'" and the said act itself, were not repugnant to section 9, article 1, of the Constitution of the United States in that the same failed to contain provisions whereby filled cheese manufactured for export under a contract previously made in a foreign country for the manufacture thereof in the United States, and the export to and delivery thereof in a foreign country, might be so manufactured and exported and sold free from the levy and payment of any duty or tax thereon.

28 (*d.*) The said court, in sustaining the said demurrer to the said declaration, and in entering judgment in the said cause in favor of the defendant and against the plaintiffs, in effect held that goods manufactured in the United States and subsequently sold in a foreign country, and exported and delivered in such foreign country, were subject to the payment of an internal revenue tax thereon, notwithstanding the provisions of section 9, article 1, of the Constitution of the United States.

(*e.*) Because section 9, of the act of Congress, approved June 6th, A. D. 1896, with reference to internal revenues, and which is entitled "An act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of 'filled cheese,'" and the said act itself are repugnant to section 9, article 1, of the Constitution of the United States in that the same failed to contain any provisions whereby filled cheese manufactured in the United States, and thereafter sold and exported to a foreign country, might be so exported and sold free from the levy of any duty or tax thereon by the United States.

(*f.*) Because section 9, of the act of Congress, arrpoved June 6th, A. D. 1896, with reference to internal revenues, and which is entitled "An act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of 'filled cheese,'" and the said act itself are repugnant to section 9, article 1, of the Constitution of the United States, in that the same failed to contain provisions whereby filled cheese manufactured in the United States under contract previously made in a foreign country, might be so manufactured, exported and delivered free from the levy

29 of any duty or tax thereon by the United States.

Wherefore, for these and other manifest errors, apparent upon the face of the record in said cause, the plaintiffs, C. W. Cornell and F. B. Cornell, plaintiffs in error, herein pray that the judgment of the said court be reversed, and that such directions may be given that the demurrer of the said defendant to the said declaration, filed by the plaintiffs in said cause, be over-ruled and that the said defendant be ordered and directed to plead to the said declaration within a short day to be fixed by the court.

MASON & MASON,
C. W. GREENFIELD,
Attorneys for Plaintiffs in Error.

(Endorsed:) Filed August 12, 1902 Marshall E. Sampsell, clerk.

30 And on to-wit: the 12th day of August, being one of the days of the regular July term of said court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. James G. Jenkins, circuit judge, appears the following entry to-wit:

Order of August 12, 1902, *Allowing Writ of Error.*

C. W. CORNELL and F. B. CORNELL, Co-partners Doing Business under the Firm Name and Style of Cornell Brothers, *vs.* F. E. COYNE, Late Collector of Internal Revenue, First District of Illinois.	26300.	Assumpsit.

Now come the plaintiffs by their attorney and present their petition for writ of error, assignment of errors and bond on writ of error in the sum of three hundred dollars, which bond is approved and said writ of error allowed, to have reviewed in the Supreme Court of the United States, the judgment heretofore entered herein, and that the clerk issue said writ of error forthwith, and deposit a copy of the same for the defendant in error.

31 And on to wit: the 12th day of August, 1902, there was filed in the clerk's office of said court in said entitled cause a certain bond on writ of error in words and figures following, to-wit:

Bond on Writ of Error.

Know all men by these presents, that we Charles W. Cornell and Frank B. Cornell, of the city of Elgin, in the county of Kane, and State of Illinois, copartners, doing business under the firm name and style of Cornell Brothers, as principals, and Robert Ross, of Chicago, Illinois, as surety, are held and firmly bound unto F. E. Coyne, late United States collector of internal revenues first district of Illinois, in the full and just sum of three hundred ($300) dollars to be paid to the said F. E. Coyne his heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with out seals and dated this 31st day of July, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a term of the circuit court of the United States, in and for the northern district of Illinois, in a suit pending in said court between the said Charles W. Cornell and Frank B. Cornell, of the city of Elgin, in the county of Kane, and State of Illinois, copartners, doing business under the firm name and style of Cornell Brothers, and said F. E. Coyne, late United States collector of internal revenues first district of Illinois, a judgment was rendered in favor of

said F. E. Coyne, late collector, etc., and against the said Charles W. Cornell and Frank B. Cornell for costs of such suit; and the said Charles W. Cornell and Frank B. Cornell having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said F. E. Coyne, late United States collector of internal revenues first district of Illinois, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date thereon:

32 Now the condition of the above obligation is such that if the said Charles W. Cornell and Frank B. Cornell shall prosecute their writ of error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES W. CORNELL. [SEAL.]
FRANK B. CORNELL. [SEAL.]
ROBERT ROSS. [SEAL.]

Sealed and delivered in the presence of:

HORACE W. HENSHAW.
PARK FULLER.

Approved August 12th, 1902.

JAS. G. JENKINS,
U. S. Circuit Judge.

O. K.
O. E. PAGIN,
Ass't U. S. Att'y.

NORTHERN DISTRICT OF ILLINOIS,
United States of America, Chicago, Illinois, Cook County.

I, Robert Ross, being duly sworn on oath, depose and say that I am a resident of the city of Chicago, county of Cook, within the northern district of Illinois, and I own in fee simple in my own name and right clear and unincumbered real estate situated within the northern district of Illinois to the value of three hundred ($300.) dollars and over. That I am worth over and above my liabilities the sum of $5000.00.

ROBERT ROSS.

Subscribed and sworn to before me this 31st day of July, 1902.

[SEAL.] WALLACE E. SHIRRA,
Notary Public.

(Endorsed:) Filed Aug. 12, 1902, Marshall E. Sampsell, clerk.

33 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, Marshall E. Sampsell, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled C. W. Cornell and F. B. Cornell, co-partners, doing business under the firm name and style of Cornell Brothers, plaintiffs *vs.* F. E. Coyne, late collector of internal revenue, first district of Illinois, defendant, as the same appear from the original records and files of said court now remaining in my custody and control.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district this 15th day of August, 1902.

MARSHALL E. SAMPSELL, *Clerk.*

34 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between C. W. Cornell and F. B. Cornell, co-partners, doing business under the firm name and style of Cornell Brothers, plaintiffs and F. E. Coyne, late collector of internal revenue first district of Illinois, defendant, a manifest error hath happened, to the great damage of the said C. W. Cornell and F. B. Cornell, co-partners doing business under the name and style of Cornell Brothers, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of August, in the year of our Lord one thousand nine hundred and two.

MARSHALL E. SAMPSELL,
Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.

Allowed by
JENKINS,
Circuit Judge.

35 [Endorsed:] 26300 Supreme Court of the United States. C. W. Cornell and F. B. Cornell copartners etc. *vs.* F. E. Coyne late collector 1st district of Illinois Writ of error. Filed Aug. 12, 1902 Marshall E. Sampsell, clerk Copy deposited for the defendant in error in the clerk's office, U. S. circuit court, northern district of Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 15th day of August, 1902.

MARSHALL E. SAMPSELL,
Clerk United States Circuit Court, Northern District of Illinois.

36 UNITED STATES OF AMERICA, *ss:*

To F. E. Coyne, late United States collector of internal revenue, first district of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein C. W. Cornell and F. B. Cornell, copartners, doing business under the firm name and style of Cornell Brothers, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James G. Jenkins, judge of the circuit court of the United States this 12th day of August, in the year of our Lord one thousand nine hundred and two.

JAS. G. JENKINS, *Judge.*

37 [Endorsed:] No. 26300 Supreme Court of the United States Cornell *et al. vs.* Coyne late col'r Citation to the Supreme Court of the United States Filed Aug. 12 1902 Marshall E. Sampsell, clerk.

I hereby acknowledge service of this writ for the said F. E. Coyne this 12th day of August A. D. 1902.

OLIVER E. PAGIN,
Assistant U. S. Attorney.

Endorsed on cover: File No. 18649. N. Illinois C. C. U. S. Term No. 118. C. W. Cornell and F. B. Cornell, copartners doing business under the name and style of Cornell Brothers, plaintiffs in error, *vs.* F. E. Coyne, late United States collector of internal revenue, first district of Illinois. Filed August 18th, 1902.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 118

C. W. CORNELL and F. B. CORNELL, copartners doing business under the name and style of Cornell Brothers,

Plaintiffs in Error,

vs.

F. E. COYNE, late United States Collector of Internal Revenue, First District of Illinois,

Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a suit brought by the plaintiffs in error, who are co-partners doing business as Cornell Brothers, in the Circuit Court of the United States for the Northern District of Illinois, against F. E. Coyne as late United States Collector of Internal Revenue, First District of Illinois, defendant in error, to recover various sums of money exacted

by him as collector at various times during his term of office, and as an internal revenue tax upon various quantities of filled cheese manufactured and exported by them, all of which sums were paid by the plaintiffs in error under protest.

It was claimed by the plaintiffs in error at and prior to the various times when said taxes were paid, that the levy and collection of such taxes were a violation of Section 9, Article 1, of the Constitution of the United States, which provides that no tax or duty shall be laid on articles exported from any state.

For a number of years Cornell Brothers have been engaged in the manufacture of filled cheese in the town of Huntley, McHenry county, Illinois, and at various times subsequent to the first day of August, 1897, they entered into various contracts in London and Liverpool, England, by the terms of which they agreed to manufacture large quantities of filled cheese in their factories in McHenry county, and to export and deliver the same in Liverpool and London in certain fixed quantities and at various intervals specified, and after said 1st day of August, and prior to the 1st day of April, 1901, they manufactured and exported and delivered in London and Liverpool, under such contracts, 1,580,479 pounds of filled cheese, manufactured by them during said period. During this entire period they complied with the Internal Revenue Laws of the United States with reference to the payment of an annual manufacturers' tax, as required by Section 3 of the Act of June 6, 1896. (29 Stat., 253.)

Each quantity or installment of filled cheese manufactured under these contracts was forwarded as soon as the same was ready for shipment direct from the factory, and application was made to the Internal Revenue Collector for

the District, for leave to forward the same without purchasing and attaching to the packages the revenue stamps required by the said Act of Congress; but notwithstanding the fact that said filled cheese was manufactured for export, and was about to be delivered for export and shipment to a foreign country, the defendant in error as such collector, refused to permit the shipments to be made until plaintiffs in error should first procure and attach to said packages the stamps required by the said Act of Congress.

Cornell Brothers were compelled to comply with this requirement in order to avoid arrest, and paid the tax specified in the said act as required by the collector, on all of the filled cheese manufactured and exported by them under these contracts. These payments extended over a period beginning September 7th, 1897, and ending March 19th, 1901.

Afterwards, and on the 8th day of May, 1901, plaintiffs in error made an appeal in writing to the Commissioner of Internal Revenue, as required by Section 3226 of the Revised Statutes of the United States, for the purpose of recovering the various sums of money so paid by them, but on the 6th day of January, 1902, the commissioner rendered a decision whereby their claim was rejected.

The action is Assumpsit, and the declaration, after setting up the foregoing facts with reference to the making of the said contracts, the manufacture of the said filled cheese thereunder, and the requirements of said collector for the payment of the said tax before he would permit the said cheese to be shipped under said contracts, contains the following averment:

> "That the plaintiffs objected and protested against the said requirement of said defendant, and contended that under the provisions of the constitution aforesaid plaintiffs were not required to place such revenue

stamps upon the said commodity when manufactured for export and exported and sold in a foreign market; but notwithstanding said protests repeated threats were made by the defendant to arrest and prosecute the plaintiffs for a supposed violation of said alleged act of Congress last mentioned, unless the plaintiffs would immediately procure and purchase revenue stamps as required by said act and attach the same to said packages before delivering the same to be forwarded in the manner aforesaid; and governed wholly by said threats of arrest and prosecution, and not otherwise, said plaintiffs did make a written requisition upon the defendant as said Internal Revenue Collector, for internal revenue stamps to be attached by them to the packages of filled cheese included in each of the said shipments, which said revenue stamps amounted in the aggregate to a large sum of money, to-wit: the sum of $20,000, which said requisitions, and each of them stated upon the face thereof in writing, that the same was made by plaintiffs under protest; and plaintiffs aver that revenue stamps were furnished to the plaintiffs by the said defendant as such collector under such requisitions, amounting to the sum aforesaid, which were paid by the plaintiffs to said defendant upon delivery. That the said requisitions, and each of them, were made by the plaintiffs wholly by reason of the demands of the defendant, and by reason of the threats aforesaid, and not otherwise.

"Plaintiffs aver that the requirements of the said defendant whereby the plaintiffs were compelled in the manner aforesaid to purchase and use the said revenue stamps, were wholly unauthorized and unwarranted by law; and that Section 9 of the Act of Congress aforesaid, and said act itself in that the same failed to contain provisions whereby filled cheese manufactured for export trade and exported and sold in foreign markets wholly without the United States, might be exported and sold free from the levy of any duty or tax thereon; or provision whereby the same might be freed from

the force and effect of said act, are repugnant to said Section 9, Article 1, of the Constitution of the United States, and that this suit, therefore, involves the construction or application of the Constitution of the United States." (5, 6.)

To the declaration is attached a bill of particulars giving the date of each shipment under said contracts, the number of packages and the number of pounds contained in each shipment, and the name of the place and the person or persons to whom each of said shipments was consigned; also the dates for the requisitions for stamps to attach to such shipments, and the amounts paid therefor, from which it appears that in each instance, or practically so, the requisition was made and the stamps procured for each shipment on the very day that the shipment was forwarded. (9-12.)

A general demurrer (13) was interposed to this declaration, which, upon the hearing, was sustained by the court and the plaintiffs, electing to stand by their pleadings, judgment was entered in favor of the defendant and against the plaintiffs. (14.) Exceptions were duly preserved to the rulings of the court, and the record is brought to this court upon a writ of error to review such rulings.

The act of June 6th, 1896, already referred to, is entitled "An Act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation and *exportation* of 'filled cheese.'" By the terms of the act special taxes are imposed upon manufacturers of filled cheese, and upon wholesale and retail dealers, and provisions are made for the payment of an annual tax by each.

Sections 9, 10, 16 and 18 are as follows:

"Sec. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manu-

facturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

"Sec. 10. That whenever any manufacturer of filled cheese sells or removes for sale or consumption any filled cheese *upon which the tax is required to be paid by stamps,* without paying such tax, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal."

"Sec. 16. That all packages of filled cheese *subject to tax under this act,* that shall be found without stamps or marks, as herein provided, and all filled cheese intended for human consumption which contains ingredients adjudged as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States."

"Sec. 18. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of this act." (29 Stat., 253; vol. 2, U. S. Compiled Statutes, 2236.)

Unlike all other internal revenue acts passed by Congress either prior or subsequent, the act contains no provision for the exportation of filled cheese without the payment of the tax; and the regulations promulgated by the department concerning filled cheese, make no reference to the exportation

of the same, but such regulations for the enforcement of Sec. 9 contain the following:

"On the withdrawal of a package the proper tax-paid stamp must be affixed thereto by the manufacturer in the same manner as the label."

Neither the act nor the regulations, however, provide specifically when and where the label shall be affixed.

We will endeavor to cover the various assignments of error by a discussion of the following propositions, viz.:

I. The levy and collection of the tax was unwarranted by law for the following reasons:

(1) It was forbidden by the constitution, which provides that no tax or duty shall be laid on articles exported from any state.

(2) This provision of the constitution is self executing.

(3) This provision of the constitution and the act of June 6th, 1896, like statutes *in pari materia*, must be construed together, and taken together they constitute the law governing the powers and duties of the internal revenue officers of the government.

(4) The court, in construing a doubtful statute will consider:

(a) The title of the act.

(b) The act as a whole, including all its provisions.

(5) It was the duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax.

II. If the collector, under the strict letter of the act of June 6th, 1896, was required to levy and collect the tax in question, then said act is unconstitutional.

BRIEF.

I.

THE LEVY AND COLLECTION OF THE TAX WAS UNWARRANTED BY LAW FOR THE FOLLOWING REASONS:

(1) *It was forbidden by the constitution, which provides that no tax or duty shall be laid on articles exported from any state.*

Article I of the Constitution of the United States is devoted to the legislative branch of the government; Section 8 enumerates the powers of Congress; and Section 9 enumerates the limitations and restrictions on the powers of Congress. The fifth paragraph of Section 9 is:

> "No tax or duty shall be laid on articles exported from any state."

"Exported" is a perfect participle, and this clause should be construed to mean that no tax or duty shall be laid on any articles *which are exported from any state.*

> Century Dictionary, verb "export" and word "participle."

Provisions of the Constitution must receive a reasonable interpretation.

> Story on the Constitution, Sec. 419.

And such reasonable interpretation should be given as well to limitations upon the power of Congress as to grants of power.

> *Fairbanks* v. *U. S.*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 650.

The same word should not necessarily be construed in the same sense wherever it occurs in the same instrument.

Story on the Constitution, Sec. 454.

This provision was to prevent discrimination by Congress between the states, and prohibits any taxation by Congress upon articles which are "exported."

Pace v. *Burgess*, 92 U. S., 372; 23 L. ed., 657, 659.

Fairbanks v. *U. S.*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 651, 652, 653.

Story on the Constitution, Sec. 1014.

Cases involving the question of interstate commerce such as *Coe* v. *Errol*, 116 U. S., 517; 6 Sup. Ct. Rep., 475, and kindred cases, have no application.

There is a distinction between the terms "tax" and "duty" as used in this clause of the Constitution. The latter is a charge fixed by reason of exportation or importation, while the former applies to any charge which may be laid upon persons or property for the support of the government.

Story on Constitution, Sec. 952.

Pacific Ins. Co. v. *Soule*, 7 Wall., 433; 19 L. ed., 95 to 99.

Hylton v. *U. S.*, 3 Dall., 171.

Savings & Loan Assn. v. *Topeka*, 21 Wall., 655; 22 L. ed., 455, 461.

Dooley v. *U. S.*, 183 U. S., 151; 22 Sup. Ct. Rep., 63.

It is a fair conclusion from the facts set up in the declaration that the intended export of the filled cheese therein mentioned was the immediate cause of the levy and collection of the tax involved in this case.

(2) *This provision of the Constitution is self executing.*

Groves v. *Slaughter*, 15 Pet., 449; 10 L. ed. 801, 819.

Davis v. *Burke*, 179 U. S., 399; 21 Sup. Ct. Rep., 210.

Dill v. *Ellicott*, 7 Fed. Cas., 691.

Ill. Cent. Ry. Co. v. *Ihlenberg*, 75 Fed. Rep., 873.

Law v. *People*, 87 Ill., 385, 392.

Wash. Home v. *City*, 157 Ill., 414, 426.

Fuller v. *Chicago*, 89 Ill., 282.

Approved by the Supreme Court of the United States.

Buchanan v. *Litchfield*, 102 U. S., 278; 26 L. ed., 138.

Same principle upheld in—

Board of Lake Co. Comrs. v. *Rollins*, 103 U. S., 662; 32 L. ed., 1060.

Dixon County v. *Field*, 111 U. S., 83; 28 L. ed., 360.

Doon Township v. *Cummins*, 142 U. S., 370; 12 Sup. Ct. Rep., 220.

(3) *This provision of the Constitution and the act of June 6th, 1896, like statutes* IN PARI MATERIA *must be construed together, and taken together they constitute the law governing the powers and duties of the revenue officers of the government.*

Cooley on Constitutional Limitations, p. 3.

Story on the Constitution, Sec. 374.

Cooper Mfg. Co. v. *Ferguson*, 113 U. S., 727; 28 L. ed., 1137.

Billingsley v. *State*, 14 Md., 369, 376.

Statutes *in pari materia* are construed together.

U. S. v. *Freeman*, 3 How., 556, 564; 11 L. ed., 724.

Doe ex. Dem. Patterson v. *Winn*, 11 Wheat., 380, 386; 6 L. ed., 500.

Atkins v. *Fiber, etc., Co.*, 18 Wall., 301; 21 L. ed., 841, 844.

Ryan v. *Carter*, 93 U. S., 84; 23 L. ed., 807, 809.

The Sloop Elizabeth, 1 Paine C. C. R., 11; 8 Fed. Cas., 468.

Potter's Dwarris on Statutes, p. 189 and note.

Smith's Commentaries, Statutory and Constitutional Construction, p. 751.

Revenue laws are liberally construed.

Cliquot v. *U. S.*, 3 Wall., 114; 18 L. ed., 116, 121.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

Against as well as in favor of the government.

U. S. v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244.

Courts, in construing a statute, will restrain its operation within narrower limits than its words import if satisfied that the liberal meaning of its language would extend to cases which a legislature never designed to include in it.

Lessee of Brewer v. *Blougher*, 14 Pet., 178, 198; 10 L. ed., 408, 418.

Oates v. *National Bank*, 100 U. S., 239, 244; 25 L. ed., 581.

U. S. v. *Am. Bell Tel. Co.*, 159 U. S., 548; 16 Sup. Ct. Rep., 70.

McKee v. *U. S.*, 164 U. S., 287; 17 Sup. Ct. Rep., 93, 95.

Woolridge v. *McKenny*, 8 Fed. Rep., 650, 659.

Where there are two acts or provisions, one special and particular, the other general, if the general standing alone would include the same matter and thus conflict with the special, the special provision must be taken as an exception.

Rodgers v. *U. S.*, 185 U. S., 83; 22 Sup. Ct. Rep., 582, 583.

Crane v. *Reeder*, 22 Mich., 322, 334.

Ex parte Crow Dog, 109 U. S., 556, 570.

Black on Interpretation of Laws, 116.

Sedgwick on the Construction of Statutory and Constitutional Law, 98.

A law requiring two repugnant and incompatible things is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible in order to arrive at the intention of the legislature.

Huidekoper's Lessee v. *Douglass*, 3 Cranch., 1, 66; L. ed., 347, 368.

Additional words of qualification may be added to a general provision.

Rodgers v. *U. S.*, 185 U. S., 83; 82 Sup. Ct. Rep., 582, 584.

Courts avoid constructions which make a law unconstitutional.

U. S. v. *Coombs*, 12 Pet., 72; 9 L. ed., 1004, 1006.

U. S. v. *Cent. Pac. Ry. Co.*, 118 U. S., 241; 30 L. ed., 175.

Hooper v. *People*, 155 U. S., 657; 15 Sup. Ct. Rep., 211.

Grenada Co. v. *Brown*, 112 U. S., 261; 28 L. ed., 704.

Parsons v. *Bedford*, 3 Pet., 433, 449; 7 L. ed., 737.

Courts also avoid a construction which makes a law ridiculous or absurd.

Holy Trinity Church, etc., v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, 513.

U. S. v. *Hogg*, 112 Fed. Rep., 909; 50 C. C. A., 608.

(4) *The court, in construing a doubtful statute, will consider—*

(a) *The title of the act.*

U. S. v. *Fisher*, 2 Cranch., 358, 387; 2 L. ed., 304, 313.

U. S. v. *Palmer*, 3 Wheat., 610, 631.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

Holy Trinity Church v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, 513.

Hadden v. *the Collector*, 5 Wall., 107; 18 L. ed., 518.

U. S. v. *Trans. Mo., etc., Assn.*, 166 U. S., 290; 17 Sup. Ct. Rep., 540, 553.

Price v. *Forest*, 173 U. S., 410; 19 Sup. Ct. Rep., 434, 440.

Coosaw Mining Co., v. *State of South Carolina*, 144 U. S., 550; 12 Sup. Ct. Rep., 659.

(b) *The act as a whole, including all its provisions.*

U. S. v. *Fisher*, 2 Cranch., 358, 386; 2 L. ed., 304, 313.

U. S. v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244.

(5) *It was the duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax.*

Sec. 18 of the Act of June 6th, 1896, provides that the Commissioner of Internal Revenue, with the approval of

the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of the said act.

29 Statutes, 253; Vol. 2, U. S. Compiled Stat., 2236.

The regulation of the commissioner requiring a manufacturer to affix the proper tax-paid stamp on the withdrawal of a package was unauthorized. The commissioner or Secretary of the Treasury can not make regulations which will defeat the law.

Campbell v. *U. S.*, 107 U. S., 410; 27 L. ed., 593.

U. S. v. 100 *Barrels of Whiskey*, 95 U. S., 571; 24 L. ed., 491.

Morrill v. *Jones*, 106 U. S., 467; 27 L. ed., 268.

II.

If the collector, under the strict letter of the Act of June 6th, 1896, was required to levy and collect the tax in question, then said act is unconstitutional.

Pace v. *Burgess*, 92 U. S., 372; 23 L. ed., 657, 659.

Fairbanks v. *U. S.*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 651, 652, 653.

Dooley v. *U. S.*, 183 U. S., 151; 22 Sup. Ct. Rep., 63.

Marbury v. *Madeson*, 1 Cranch., 178; 2 L. ed., 74.

The construction placed by Congress upon this clause of the Constitution, by inserting in all prior and subsequent internal revenue acts a provision for exportation without payment of the tax, should have great weight in determining the constitutionality of the act.

Stuart v. *Laird*, 1 Cranch., 299; 2 L. ed., 115.

Burlow-Giles Lith. Co. v. *Sarony,* 111 U. S., 53; 28 L. ed., 249; 4 Sup. Ct. Rep., 279.

The Laura, 114 U. S., 411; 29 L. ed., 147; 5 Sup. Ct. Rep., 881.

U. S. v. *Filbrick,* 120 U. S., 52, 59; 30 L. ed., 559, 561; 7 Sup. Ct. Rep., 415.

U. S. v. *Hill,* 120 U. S., 169, 182; 30 L. ed., 627, 632; 7 Sup. Ct. Rep., 510.

Robertson v. *Downing,* 127 U. S., 607 to 613; 32 L. ed., 269, 271; 8 Sup. Ct. Rep., 1328.

Schell v. *Fauche,* 138 U. S., 562, 572; 34 L. ed., 1040, 1043; 11 Sup. Ct. Rep., 376, 380.

ARGUMENT.

I.

THE LEVY AND COLLECTION OF THE TAX WAS UNWARRANTED BY LAW.

(1) *It was forbidden by the Constitution, which provides that no tax or duty shall be laid on articles exported from any state.*

Article 1 of the Constitution of the United States is devoted to the legislative branch of the government; Section 8 enumerates the powers of Congress; and Section 9 enumerates the limitations or restrictions on the powers of Congress. The fifth paragraph of Section 9 is as follows:

> "No tax or duty shall be laid on articles exported from any state."

Perhaps the first question which naturally arises in a consideration of this branch of the case, is:

Does this provision in the Constitution apply to this case as made out by the declaration, and are the goods exported, as set forth in the declaration, "articles exported" within the meaning of that term as employed in this provision of the Constitution?

The language is that no tax shall be laid on "articles exported." The word "exported" is undoubtedly a participle derived from the transitive verb "export," and is used in this connection as an adjective, or as what is known as a participial adjective, limiting or defining the term articles.

The Century Dictionary gives the following definition of the transitive verb "export":

> "To send to a distant point, as commodities; send for sale or exchange to other countries or places,"

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and Webster gives to the same word the following definition:

> "To carry from a state or country, as wares in commerce; to send out, as valuable commodities, to other nations or communities; as to *export* grain, cotton and the like."

The Century Dictionary defines the word "participle" as "a verbal adjective that participates or shares in the con-"struction of the verb to which it belongs, and so has in a "certain manner and degree a place in the verbal system; "and should have the value of the adjective as part of "speech, but so regularly made from a verb and associated "with it in meaning and construction as to seem to belong "to the verb. Thus 'giving him a book' like 'I give him a "book'; 'the book given him' or 'lent him' or 'handed him'; "and so on."

It would seem, therefore, that the words "articles exported," as used in this clause of the Constitution, are equivalent to the phrase or expression "articles which are exported," and, therefore, the full meaning of the provision would seem to be that no tax or duty shall be laid on any *articles which are exported from any state.*

"Export" is defined in the Century Dictionary as "that "which is exported; a commodity carried from one place "or country to another for sale"; and in Webster's International Dictionary as "that which is exported; a commod-"ity conveyed from one country or state to another in the "way of traffic."

These definitions are in harmony with the decisions of this court, except that in the cases of *Brown* v. *Houston,* 114 U. S., 622; 29 L. ed., 257; *Woodruff* v. *Purham,* 8 Wall., 123; 19 L. ed., 382; and *Dooley* v. *U. S.,* 183 U. S., 151; 22 Sup. Ct. Rep., 62, 66, it was held that the words "exports" and "imports," as used in the Constitution, particu-

larly in Sec. 10, Art. I, relate only to exports to and imports from foreign countries.

While, according to these definitions, "export" is in a sense synonymous with "articles exported," the connections in which they are used in the Constitution would seem to indicate that the framers of that instrument did not intend to use these words or expressions interchangeably. In paragraph 5, Section 9, the language used is as above stated "no tax or duty shall be laid on articles exported from any state"; but in paragraph 2, Section 10, of the same article, the language used is: "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports." It is a matter of history that in the first draft of the Constitution the latter provision stood "no state, without the consent of Congress, shall lay imposts or duties on imports," the word "exports" not being included. But the provision was subsequently amended by adding "or exports."

Journal of Constitutional Convention, 227, 303.

The term here employed is so intimately connected with the word "imports" that the word "exports" was very naturally adopted as conveying the corresponding idea of articles sent out to and sold in foreign countries.

It does not follow that the words "articles exported" are used in the provision restricting the powers of Congress in precisely the same sense that the word "exports" is used in the provision restricting the powers of the state. In Story on the Constitution, Sec. 454, in discussing rules of interpretation, the author says:

> "And this leads us to remark in the next place that it is by no means a correct rule of interpretation to construe the same word in the same sense wherever it occurs in the same instrument. It does not follow, either logically or grammatically, that because a word

is found in one connection in the Constitution with a definite sense, therefore, the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighed only the force of single words as philologists or critics, and not whole clauses and objects as statesmen and practical reasoners."

The word "export" as used in the tenth section is employed as a restriction applied to the states and not to the general government. The subsequent decisions of this court on questions affecting the powers of any state to regulate and control property within its limits, afford sufficient justification for the argument that a *state* may levy taxes on goods within its borders at any time prior to the time when exportation actually commences, at which time such goods are brought under the immediate control of Congress under the power granted in the Constitution to regulate commerce among the states with foreign nations and Indian tribes, but it does not follow that a collector of internal revenue has power under the Constitution to exact a tax on "articles exported" at any time or under any conditions; and, inasmuch as the words "articles exported" are used in this connection in preference to the term "exports," it would seem that it was clearly intended that no tax should thus be levied or collected upon "articles exported" under any circumstances, either before or after exportation had actually commenced.

It seems, therefore, that the words "articles exported" as used in Section 9 of the Constitution, include any and all products which may at any time be exported, and relate to such products in their general character or condition before as well as after exportation has actually commenced; while the word "exports," as used in Section 10, has a more limited significance, and relates not to the character of such products

generally, but simply has reference to their character as exports, and at the time when and after exportation has actually commenced.

In construing the Constitution courts frequently seek light from the history of the convention which formulated and adopted that instrument, and by referring to these proceedings it appears that this clause, in the precise form in which it was finally adopted, was reported in the first draft of the Constitution. Subsequent attempts were made to amend it, one by inserting after the word "duty" the words "for the purpose of revenue," and the other by inserting at the end the words "unless by consent of two-thirds of the legislature," but neither of these amendments was adopted.

This would seem to indicate that it was the purpose of the convention to prohibit all taxes by the general government of every form upon "articles exported," and that no such tax was to be permitted for any purpose or under any pretext whatever.

Mr. Story, in his work on the Constitution, Sec. 1014, in commenting on this provision, and the other restrictions contained in the same paragraph of the Constitution says:

> "The obvious object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one state so as to favor or aid another. If Congress were allowed to lay any duty on exports from any one state it might unreasonably injure, or even destroy the staple productions or common articles of that state. The inequality of such a tax would be extreme. In some of the states the whole of their means result from agricultural exports. In others a great portion is derived from other sources, from external fisheries, from freights, and from the profits of commerce in its largest extent. The burden of such a tax would, of course,

be very unequally distributed. The power is, therefore, wholly taxen away to intermeddle with the subject of exports."

In the case of *Fairbanks* v. *United States,* 181 U. S., 283; 21 Sup. Ct. Rep., 648, 652, to which case a more extensive reference will be made hereafter, this court, in discussing this same provision of the Constitution, after referring to these attempted amendments of the clause, says:

> "So, it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation."

It being clear that the purpose of this restriction was to prevent an unjust discrimination between the states by prohibiting the levy of any tax by the general government upon the natural products exported from any one section of the country whereby an unequal burden would be imposed upon the states producing such commodities, how could such purpose be accomplished if an internal revenue collector, in enforcing the general revenue laws, may levy and collect such tax upon goods produced in a given locality, regardless of the fact as to whether or not such goods may be intended for export, or whether or not they may be subsequently exported and sold in a foreign market?

The facts of this case as they appear in the declaration, all of which so far as well pleaded, are admitted by the demurrer, seem clearly to entitle plaintiffs in error to the benefit of this provision of the Constitution. McHenry county, where their factories are located, is in close prox-

imity to Elgin, Illinois, the recognized center of the dairying interests of this country. The Elgin market is accepted throughout the country as controlling absolutely the prices of dairy and creamery butter, which is one of the principal products of the dairying industry. "Filled cheese," as defined and treated in the Act of June 6th, 1896, under consideration, is manufactured from skimmed milk, or milk from which the cream or butter fat has first been removed by mechanical process for the purpose of manufacturing the same into creamery butter. Filled cheese, therefore, is necessarily a product of those communities where creamery butter is the chief dairy product. If, then, this provision of the Constitution can be so construed as to require manufacturers of filled cheese, who manufacture for export trade and export the same and sell it in foreign markets, to pay an internal revenue tax on such filled cheese so exported, the object of the framers of the Constitution in inserting this provision may be entirely defeated, for clearly such a construction would impose upon the communities or states which produce filled cheese, a tax burden which is not imposed by present existing laws upon cotton, wool, grain, minerals, and many other articles which are the staple products of various other states of the Union in which no filled cheese is produced.

It appears from the declaration in this case that the filled cheese in question was manufactured under contracts previously made in London and Liverpool, England, to be exported to England; that it was manufactured for the express purpose of filling such contracts; and that as soon as each installment or quantity required by said contracts was manufactured the same was exported direct from the factories, and was actually sold and delivered in London and Liverpool, England. It would seem that these facts bring the

case very clearly within the provision of the Constitution and that the levy and collection of the tax in question is, therefore, not only unwarranted, but was actually forbidden by law.

It is undoubtedly a rule of construction, applicable to this question, that the provisions of the Constitution must receive a reasonable interpretation, and that the same rule of construction should be applied to provisions limiting the powers of Congress, that is applied to provisions granting powers to Congress.

Story on the Constitution, Sec. 419, says:

> "From the foregoing considerations we deduce the conclusion that, as a frame or fundamental law of government, the Constitution of the United States is to receive a reasonable interpretation of its language and its powers, keeping in view the objects and purposes for which those powers were conferred. By a reasonable interpretation we mean that, in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted which is most consonant with the apparent objects and intent of the Constitution; that which will give efficacy and force as a *government,* rather than that which will impair its operations and reduce it to a state of imbecility. Of course, we do not mean that the words for this purpose are to be strained beyond their common and natural sense, but, keeping within that limit, the exposition is to have a fair and just latitude so as on the one hand to avoid obvious mischief, and on the other hand to promote the public good."

In the case of *Fairbanks* v. *U. S.*, already referred to, in discussing the subject of constitutional limitations upon the powers of Congress the court, 21 Sup. Ct. Rep., on page 650, after referring to the above rule, said:

> "We are not here confronted with a question of the

extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted, and as taking with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution, in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed; * * * * the true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

In view of the manifest purpose of this provision of the Constitution, as laid down by Mr. Story and as heretofore recognized by this court, and of the rules of construction which have also been adopted by this court, as above indicated, it would seem that a proper construction of this clause of the Constitution ought to prevent the taxation by the general government of any articles actually exported from any state.

So far as we are able to discover this question in this precise form has never been presented to this court; probably for the reason that the act in question levying an internal revenue tax upon filled cheese seems to be the only internal revenue act ever passed by Congress which failed to provide for the exportation of the commodity taxed without the payment of the tax. The case of *Pace* v. *Burgess*,

92 U. S., 372; 23 L. ed., 657, 659, however, seems to have a bearing upon the question. This was a suit brought against a collector to recover moneys paid by a manufacturer of tobacco for stamps issued by the department under the Acts of July 20th, 1868 (15 Stat., at L. 157) and of June 6th, 1872 (17 Stat. at L., 254) and used upon tobacco manufactured for export trade, for the purpose of distinguishing it from tobacco intended for domestic trade, the acts providing that an export stamp of that character, for which a nominal price was charged, should be procured and affixed to each package which was for exportation, merely as a distinguishing stamp and not as a tax.

The constitutionality of the act was brought into question and the court, in disposing of that contention, used the following language:

> "The plaintiff contends that the charge for the stamps, required to be placed on packages of manufactured tobacco intended for exportation, was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that 'No tax or duty shall be laid on articles exported from any state.' But it is manifest that such is not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimit-

ed, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business.

"The evidence given to show that the original cost of the stamps was never less than the amount paid for them by the manufacturers, is entitled to very slight consideration. The cost of the paper, ink and printing formed but a small part of the expense of those arrangements which were necessary in order to give to the exporter the benefit of exemption from taxation, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretense of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. *The point to guard against is the imposition of a duty under the pretext of fixing a fee.* In the case under consideration, having due regard for that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we can not say that the charge imposed is excessive, *or that it amounts to an infringement of the constitutional provision referred to. We can not say that it is a tax or duty instead of what it purports to be,* a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

In that case the court clearly recognized the right of the exporter to exemption from taxation under this provision of the Constitution in very strong terms when it said that *the imposition of a duty under the pretext of fixing a fee is a point to be guarded against.*

The case of *Fairbanks* v. *United States,* 181 U. S., 283; 21 Sup. Ct. Rep., 648, already referred to, was a criminal prosecution brought by the government against Fairbanks, an agent of the Northern Pacific Railway Company, for violating the provisions of the Spanish War Revenue Act of June 6th, 1898, which required a 10 cent revenue stamp to be placed upon all foreign bills of lading. It was contended on behalf of the defendant that the act was in violation of the clause of the Constitution now under consideration, and that the levying of an internal revenue tax upon a foreign bill of lading was in fact a tax upon the articles exported and consigned under the bill of lading. Mr. Justice Brewer, in discussing this clause of the Constitution, on page 651, 21 Sup. Ct. Rep., uses the following language:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and, as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose

of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purpose of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution."

Then follows a discussion of the alleged difference between requiring a revenue stamp to be fixed to a bill of lading and the imposition of a tax upon the articles themselves which are consigned under such bill of lading, and in the course of that discussion the Court quoted from and commented upon the argument of counsel for the government in the following manner:

"Counsel for the government, in his interpretation of the scope and meaning of this constitutional limitation, says:

" 'To give Congress the power to lay a tax or duty on articles exported from any State meant to authorize inequality as among the States in the matter of taxation. If the north happened in control in Congress, it might tax the staples of the south; if the south were in power it might place a duty on the exports of the north. As a part, therefore, of the great compromise between the north and the south, this clause was inserted in the Constitution. The prohibition was applied, not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or

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duty on the *articles exported,* for these could not be taxed without discriminating against some States and in favor of others.'

"This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent the discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to the constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word 'duty' the words 'for the purpose of revenue,' but the motion was voted down."

The case of *Dooley* v. *U. S.,* 183 U. S., 151; 22 Sup. Ct. Rep., 62, involved the constitutionality of the Foraker Act, so far as it fixes duties to be paid upon merchandise imported into Porto Rico from the port of New York.

This clause of the Constitution was frequently referred to in both the majority and dissenting opinions, and Mr. Justice Brown, in delivering the majority opinion, after discussing the question as to whether or not goods shipped from New York to Porto Rico were exported, said:

"In another view, however, the case presented by the record is whether a duty laid by Congress upon goods arriving at Porto Rico from New York is a duty upon an export from New York, or upon an im-

port from Porto Rico. The fact that the duty is exacted upon the arrival of the goods at San Juan certainly creates a presumption in favor of the latter theory. At the same time it is possible that it may also be a duty upon an export. The mere fact that the duty is not laid at the port of departure is by no means decisive against its being such. It is too clear for argument that if vessels bound for a foreign country were compelled to stop at an intermediate port and pay into the treasury of the United States a duty upon their cargoes, such duty would be a tax upon an export, and the place of its exaction would be of little significance. The manner in which and the place at which the tax is levied are of minor consequence."

From the above language it would seem that it makes no difference where or when the tax is laid and collected, as the Court said: "The manner in which and the place at which the tax is levied are of minor consequence," all of which would indicate that no tax could at any time be properly laid upon articles exported, either before or after exportation had actually commenced.

In the license tax cases, 5 Wall., 462, 471; 18 L. Ed., 497, 500, Chief Justice Chase, in discussing the powers of Congress under the Constitution to lay and collect taxes, duties, imposts and excises, said:

> "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. *Congress can not tax exports;* and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only it reaches every subject, and may be exercised at discretion."

It will undoubtedly be argued in this case on behalf of the government, that under a proper construction of this

provision of the Constitution a tax may not be levied by the general government upon articles exported simply because they are exported, but that a collector, under the provisions of the Act in question regulating filled cheese, might properly assess and collect such tax at any time before exportation had actually begun, and the case of *Turpin* v. *Burgess*, 117 U. S., 504; 29 L. Ed., 988, will undoubtedly be cited in support of such contention.

Although no formal opinion was filed in this case in the Court below, it was understood that the trial court ruled in favor of the defendant on the strength of this case of *Turpin* v. *Burgess* and it may not be improper, therefore, for us to refer to and consider that case in this connection.

Turpin v. *Burgess*, like the case of *Pace* v. *Burgess* above cited, was a suit brought against a collector to recover various amounts paid for export stamps of the same character as those involved in the former *Burgess* suit. The opinion in this latter *Burgess* case was delivered by Mr. Justice Bradley, who also delivered the opinion of the Court in the former case, and, after stating the facts in the case on page 989 (29 L. Ed.) said:

> "We had occasion to examine the very question raised in this case in *Pace* v. *Burgess*, reported in 92 U. S., 372, and were unanimously of opinion that the Act requiring the exportation stamp complained of was a valid and constitutional act. The reasons for that decision were given at length in the report of that case, and we see no occasion to modify the views then expressed. The finding of facts so called, made by the Court in the present case by consent of the parties who waived a jury, does not change the character of the question. Every fact now found was assumed or virtually involved in the former case."

Having thus disposed of the case upon a previous ruling of the Court, which has since been reviewed and adhered

to by the Court in the case of *Fairbanks* v. *U. S., supra,* Mr. Justice Bradley then proceeds to put the decision *also* upon a new and different ground from that considered in the former *Burgess* case and says:

> "There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided in *Coe* v. *Errol* that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation or intended exportation."

The balance of the opinion which follows the above quotation is based entirely upon the case of *Coe* v. *Errol* and all that was said in that connection was manifestly unnecessary to a proper decision of the case, and consequently may be considered as *obiter dicta.*

The case of *Coe* v. *Errol* was a suit brought in New Hampshire in the State Court for an abatement of a general State, County, Town, School and Highway tax, which had been levied upon a quantity of saw logs, some of which had been cut within the State of New Hampshire and brought to the bank of a river within the jurisdiction of the town by which the tax had been levied, for the purpose of floating them down the river to another State; and the balance of the logs had been cut in the State of Maine and floated down the same river through the State of New Hampshire enroute to a mill in the State of Maine, and had arrived at the same point where the other logs cut in New Hampshire had been landed, and all the logs cut in

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Maine, as well as those cut in New Hampshire, had been held at this point on account of low water.

The logs were all owned by the same parties, who were nonresidents of the State of New Hampshire, and who resided in the States of Maine and Massachusetts.

It so happened that the logs cut in Maine, as well as those cut in New Hampshire, were within the jurisdiction of the town at the time this general State, County, Town, School and Highway tax was levied, and the date on which, under the laws of New Hampshire, such taxes attached to all property within the State.

It was held by the New Hampshire Court that the town could not levy a tax upon the logs which were merely held up temporarily while enroute through the State; but they also held that the logs which had been cut within the State, although already delivered on the banks of the river for the purpose of transporting or floating them down the river into another State, were still a part of the mass of property of the State, and subject to tax within the State so long as the process of transportation had not already commenced at the time the tax became fixed by the laws of the State.

It was contended on the part of the owners of the logs that the tax upon the logs cut in New Hampshire was unauthorized and was a violation of paragraph 2, section 10, article 1, of the Federal Constitution, which provides that "no State shall without the consent of Congress lay any imposts or duties on imports or exports"; and it was also contended that the levy of the tax was a violation of that section of the Federal Constitution which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several States."

The opinion of the Court in the case of *Coe* v. *Errol* was also delivered by Mr. Justice Bradley, and it is quite as

difficult to understand why, under the facts in that case, the clause of the Federal Constitution which provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," should have been considered in that case at all as it is to understand why the case of *Coe* v. *Errol* should have been applied in the decision of the latter *Burgess* case.

Prior to the decision of *Coe* v. *Errol* it had been decided in the case of *Woodruff* v. *Parham,* 8 Wall., 123; 19 L. ed., 382, that the words "imports" and "exports," as used in the Constitution, were used to define the shipment of articles between this and foreign countries, and not such shipments between the States; nevertheless, in the opinion in *Coe* v. *Errol* Mr. Justice Bradley, after eliminating from the case the fact of the owners being nonresidents, said:

> "We recur, then to a consideration of the question freed from this limitation: Are the products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?
>
> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.
>
> "This question does not present the predicament of goods in course of transportation through a State, although detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of

transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* of that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is unreasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

"Of course, they can not be taxed as exports; that is to say, they can not be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, *Woodruff* v. *Parham*, 8 Wall., 123 (75 U. S., bk. 19; L. ed., 382), that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one State to another, it can not be doubted that such an imposition would be a regulation of commerce among the States and,

therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan* (ante 691), decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment of such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding." (116 U. S., 517; 29 L. ed., 715.)

What the Court really decided in *Coe* v. *Errol* is not whether the intention of the owner or manufacturer of certain articles to export them would exempt them from liability to taxation by the State authorities by reason of the restriction contained in Paragraph 2, Section 10, Article 1 of the Constitution, but rather whether the intention of such owner or manufacturer to ship such goods from one State to another, by means of interstate commerce, would, before such transportation actually commenced, exempt the goods from taxation by the State authorities by reason of the provisions of the Constitution which gives to Congress power to regulate commerce with foreign nations and

among the several States, a principle which has now become thoroughly established by frequent decisions of this and other federal courts.

The frequent use of the word "export" in the opinion in *Coe* v. *Errol*, when no exports were involved in the case, quite naturally led to confusion, and was probably the sole cause of the attempted application of a question of interstate commerce in the latter *Burgess* case, while construing the provisions of the Constitution, which denies to Congress the power to lay taxes or duties on articles exported from any State.

Although in *Coe* v. *Errol* and in numerous other subsequent decisions, the principle has been firmly established that a State has absolute control over the property within its borders until transportation to a foreign State by means of interstate commerce has actually commenced, at which time the property comes within the protection of the law of the Federal government, and such property continues under the protection of the Federal government by virtue of its power to regulate commerce between the States until such goods have reached their destination and are sold and have become mingled with the mass of property of the State of their destination; what possible application can this principle have in determining whether an internal revenue collector may, in the discharge of his duties as an officer of the government, levy and collect an internal revenue tax upon articles which are about to be exported, and which are subsequently exported and sold in a foreign market? The question before the Court in this case is not a question involving interstate commerce, but one of international commerce or exportation, in its most comprehensive sense; therefore, the rule which makes it necessary to fix some time when the power or authority of the State over

property affected by interstate commerce, ceases, and when the powers of the general government attach, can have no application in determining this question as it is a question of exportation pure and simple, and not in any sense one of interstate commerce.

But more than that, under the facts set forth in the declaration in this case, there was no time when any rule applicable to interstate commerce could be applied because the collector, knowing that the goods were about to be exported, refused to permit them to be delivered to a carrier for transportation until the tax had first been paid, and threatened plaintiffs in error with arrest and prosecution if such goods were so delivered for transportation and forwarded without the payment of the tax, thus absolutely preventing the act of transportation, and so, acting under this compulsion, and in fear of arrest and prosecution by the collector, they yielded to his requirement under protest and paid the tax by purchasing and attaching the stamps required on the very day that the goods were delivered into the hands of the carrier for transportation, in order that their original purpose of transportation and exportation might not be interfered with, and the contracts made long prior thereto might be fulfilled.

It would seem, therefore, that the principle of interstate commerce, as applied in the case of *Coe* v. *Errol,* and other subsequent cases, and further, that what was said in *Turpin* v. *Burgess,* by way of an application of that principle to that case, was not only *obiter dicta,* but has absolutely no application to this case.

But it is clear that the trial court, in applying the case of *Turpin* v. *Burgess,* lost sight of the distinction between this case and *Coe* v. *Errol,* and that the exportation or non-exportation of this filled cheese did not rest merely in the

intention of the plaintiffs in error to export the same, but they were absolutely bound, under their contracts, as already shown, to export it, and surely there is no reason why a presumption should be indulged that they would violate their contract and not actually export this filled cheese, as they were bound to do under the terms of their agreement. The language of Mr. Justice Bradley in *Coe* v. *Errol,* viz.: "Although intended for exportation they may never be exported; the owner has a perfect right to change his mind, and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?" can therefore have no application to this case; plaintiff's in error were under solemn obligation to export their filled cheese, which would not permit them to change their minds. While we thoroughly and sincerely believe that this provision of the Constitution forbids the levy and collection of any tax upon articles *which are exported,* whether manufactured expressly for exportation or not, and that this clause carefully construed, does not mean simply that such tax shall not be levied merely because of such exportation; at the same time it seems apparent, from the facts appearing in this record, that the taxes in this case were levied and collected at the times complained of simply because this filled cheese was about to be delivered to a transportation company to be exported to a foreign country.

In this connection we also desire to direct the Court's attention to the case of *Brown* v. *Houston,* 114 U. S., 622; 29 L. ed., 257. It appeared in that case that plaintiffs were miners and dealers in coal at Pittsburg, and had shipped a large quantity of coal on flat boats down the Mississippi and Ohio Rivers to their agents at New Or-

leans, to be sold by them in cargo lots. After the arrival of the cargoes at New Orleans a general state tax under the laws of Louisiana was assessed upon the coal, and suit was brought by the owners to enjoin the collection of the tax. The opinion, which was delivered by Mr. Justice Bradley, reaffirms the doctrine laid down in *Woodruff* v. *Parham* that the words "imports" and "exports," as used in the Constitution, relate only to exports to and imports from foreign countries, which disposed of one of the contentions in that case, viz.: that the coal in question was imported into the State of Louisiana, and therefore, could not be taxed by the State by reason of Section 10, Article 1, of the Federal Constitution, which provides that no State, without consent of Congress, shall levy any tax on imports or exports.

It was claimed in the evidence in that case that certain portions of this coal had been exported after the filing of the bill, and before the hearing and in disposing of this feature of the case the Court said:

> "When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testified the same thing, and adds that it was to be sold by the flat boat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans and held there on sale, without reference to the destination, or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If, after this, and after being sold, the purchaser thought proper to put it on board of a

steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it can not be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards. This is the most that can be said for the goods in question, and we are therefore of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration."

There is a vast difference between a general state tax and an internal revenue or impost tax or duty; the former is a uniform *ad valorem* tax assessed on all property within the State at the time the assessment is made, while the latter is an arbitrary amount fixed upon the property by measurement, regardless of the value, and is in the nature of a license exacted from a manufacturer or importer for the privilege of manufacturing or importing the goods affected by such tax.

All personal property is subject to a general state tax by the State within which it is located at the time such taxes are levied, and an internal revenue tax is imposed and operates as an additional burden, and this is undoubtedly what the Court referred to in *Brown* v. *Houston* when it said: "Where a general tax is laid on all property alike it can not be construed as a duty on exports when falling on

goods not intended for exportation, though they should happen to be exported afterwards." Undoubtedly a pretended general tax levied by a State on goods within its borders, not in the regular or usual way, but solely by reason of the intended exportation of such goods, would be tantamount to a duty on exports, and therefore, void. But is it true, or does it follow that an internal revenue tax, in order to operate as a tax on articles exported, must be levied by reason of the exportation or intended exportation of such articles?

The language of Mr. Chief Justice Marshall in *Brown* v. *Maryland,* 12 Wheat., 437; 6 L. ed., 685, does not so indicate. That case arose under that section of the Federal Constitution which provides that no State, without consent of Congress, shall lay any imposts or duties on imports or exports, and involved the constitutionality of a law of Maryland, which required importers of foreign goods to pay a license fee to the State authorities. In discussing this question the Chief Justice said:

> "An impost, or duty on imports, is a custom or tax levied on articles brought into a country, and is most usually secured before an importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What then are 'imports'? The lexicon informs us they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles

themselves which are brought into the country. 'A duty on imports,' then is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered a country."

And the language of the present Chief Justice in the case of *Dooley* v. *U. S. supra* is to the same effect. Having quoted the foregoing language from *Brown* v. *Maryland,* he said:

> "And so of exports. They are the things exported—the articles themselves. *A duty on exports is not merely a duty on the act of exportation, but is a duty on the article exported, and the article exported* remains such until it has reached its final destination. The place of collection is purely incidental, and immaterial on the question of power."

So also the language of Mr. Justice Brewer in *Fairbanks* v. *U. S., supra,* when he said:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty' * * * If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported it is because it has power to do so; and if it has power to impose this amount of stamp duty, it has power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation, which was one of the purposes of the Constitution."

Thus we have endeavored to show that the case at bar is quite different from a case where a general tax is laid on all property alike. An internal revenue tax on filled cheese, not based on its value and made in addition to the regular State and County taxes on all property within the State at the time such tax is laid, is not a general tax on all property alike, but simply a tax laid upon one product, which leaves a vast number of the natural products of other States and communities wholly and entirely untaxed. This of itself is a sufficient reason why *Coe* v. *Errol* and *Brown* v. *Houston* have no application to this case.

There is also a distinction between the term "tax" and "duty" as used in this clause of the Constitution, which should be taken into consideration in this connection.

In Story on the Constitution, Sec. 952, with reference to the word "duties," the author says:

> "In its large sense it is very nearly an equivalent to taxes."

In *Pacific Ins. Co.* v. *Soule*, 7 Wall., 433; 19 L. ed., 95, 99, the court, considering the term "duties," said:

> "*Duties* are defined by Tomlin to be things due and recoverable by law. The term in its widest signification is hardly less comprehensive than 'taxes.' It is applied in its most restricted meaning to customs; and in that sense is nearly the synonym of 'imposts.' Tomlin Dic. 'Duty;' 1 Story Const., Sec. 952; *Hylton* v. *U. S.*, 3 Dall., 171.
>
> "*Impost* is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Story Const. Abr., Sec. 474. Colwell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Colwell Interpreter, tit. 'Impost.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses

as synonymous. 1 Story Const., 669, n. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, "taxes and excises."'"

It would seem, therefore, that the term "duty" is applied when a tax is laid or exacted upon property by reason of some change in the position of such property, either by its being sent out of the country, or brought into the country, while the term "tax" is more general, and may be applied to any charge imposed under any circumstances upon persons or property to raise money for public purposes.

See

Savings & Loan Assn. v. *Topeka,* 20 Wall., 655; 22 L. ed., 455, 461.

Undoubtedly the court had this distinction in mind when it said in *Brown* v. *Houston* "A duty on exports must either "be a duty levied on goods as a condition or by reason of "their exportation, or at least a direct tax or duty on goods "which are intended for exportation."

A general tax levied on property not in the usual and ordinary way, but by reason of its intended exportation, if such a thing were possible, would undoubtedly be a duty, for the reason that the fact or occasion which would thus give rise to the levy of the tax would be its change of position or exportation to another country.

So it may be said that any tax which the government might attempt to lay upon the property of any state, by reason of its intended exportation, would be a duty because the occasion which would give rise to the levy of such tax would be the change of position of the property or its exportation. This, it will be conceded, however, could not be done.

But, under the Constitution, the government can lay

neither tax nor duty on any property exported, and consequently it must follow that no tax can be laid, either before or after exportation has actually commenced.

In *Dooley* v. *U. S., supra,* Mr. Chief Justice Fuller, in delivering the dissenting opinion, said:

> "The prohibition on Congress is explicit and noticeably different from the prohibition on the states. The state is forbidden to lay any 'imposts or duties;' Congress is forbidden to lay any 'tax or duty.' The state is forbidden from laying imposts or duties on imports or exports; that is, articles coming into or going out of the United States. Congress is forbidden to tax articles exported from any state."

We submit, therefore, that *Coe* v. *Errol* and *Brown* v. *Houston* have no application for the following reasons, viz.:

1. They involve questions of interstate commerce and do not in any sense involve the question of exportation.

2. A general tax is an *ad valorem* tax, while an internal revenue tax is in addition to a general tax, and the amount is not determined by the value of the property affected, and is, therefore, not uniform, but is a discriminating tax.

3. The application of these cases to questions of internal revenue would always defeat exemption from taxation under the Constitution by preventing the delivery to a carrier for exportation until the tax had first been paid.

4. It is not necessary that an internal revenue tax, in order to operate as a tax on articles exported, should be laid on such articles by reason of their exportation, or intended exportation; any government tax on such articles is a burden on exportation and, therefore, contrary to the spirit of the Constitution.

5. A general state tax like that involved in those cases would be a duty, if levied because of exportation; but Con-

gress is prohibited from laying either tax or duty on articles exported.

Whether the collector in this case simply misconceived what his duties under the law were, or whether the Act of June 6, 1896, in question, is unconstitutional, it seems clear that by a fair and reasonable construction the tax was wrongfully exacted, because it was prohibited by this provision of the Federal Constitution.

(2)

This provision of the Constitution is self executing.

The rule is that provisions of a Constitution which are prohibitory, and need no action on the part of the legislature to give them effect, are self executing. This provision of the Constitution is clearly prohibitory and, therefore, must be a self executing provision.

The question of self executing provisions in a Constitution seems to have been first presented to this Court in the case of *Groves* v. *Slaughter,* 15 Pet., 449; 10 L. ed., 801, 819. That case involved the construction of a clause in the Constitution of the State of Mississippi, which was as follows:

> "The introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833."

It was urged in that case that this provision of the Constitution needed no act of the Legislature to give it effect, and that it was therefore self executing; but the Court, although recognizing that principle, held that that particular clause was not self executing because it was not complete in itself, but required some act of the Legislature to give it effect, as the language was that the introduction of slaves, etc., "shall be prohibited"; that is, that the Legislature of

the State, by an appropriate act, should prohibit such introduction of slaves, on and after the date specified.

The Court will observe that the language of the provision of the Constitution involved in this case is "no tax or duty shall be laid," which is an absolute prohibition in itself and manifestly could not require an act of Congress to give it effect.

On the contrary, it prohibits any action whatever on the part of Congress upon the subject.

A more recent case upon this question is that of *Davis* v. *Burke*, 179 U. S., 399; 21 Sup. Ct. Rep., 210. That case involved the construction of a provision of the Constitution of the State of Idaho, which is as follows:

> "No person shall be held to answer for any felony or criminal offense of any grade unless," etc.

The Court said:

> "But we are also of opinion that for the purposes of this case the provisions of the Idaho Constitution must be deemed self executing. The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): 'A constitutional provision may be said to be self executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus a Constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self executing, and legislation is essential.'
>
> "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to

enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself."

Se also *Law* v. *People*, 87 Ill., 385, 392.
Wash. Home v. *City*, 157 Ill., 414, 426.
Fuller v. *Chicago*, 89 Ill., 282.

Approved by this Court in:

Buchanan v. *Litchfield*, 102 U. S., 278; 26 L. ed., 138.

The same principle is also upheld by this Court in:

Board of Lake Co. Comm. v. *Rollins*, 103 U. S., 662; 32 L. ed., 1060.
Dixon County v. *Field*, 111 U. S., 83; 28 L. ed., 360.
Doon Township v. *Cummins*, 142 U. S., 370; 12 Sup. Ct. Rep., 220.

(3)

This provision of the Constitution and the Act of June 6th, 1896, like statutes in pari materia, must be construed together, and taken together they constitute the law governing the powers and duties of the revenue officers of the government.

This provision of the Constitution being self executing it is as much a rule of action governing the conduct and defining the duties of the government officials as any Act

of Congress, and indeed should be much more strictly observed and followed by them, because the Constitution outranks and is over and above all legislation.

Cooley on Constitutional Limitations, page 3, says:

> "In American constitutional law the word *Constitution* is used in a restricted sense as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it which must control, until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void."

In Story on the Constitution, Sec. 374, the author says:

> "The Constitution, contemplating the grant of limited powers, and distributing them among various functionaries,—and the State governments, with their functionaries, being also clothed with limited powers, subordinate to those granted to the general government, —whenever any question arises as to the exercise of any power by any of these functionaries under the State or Federal government, it is of necessity that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such power. It may arise in the course of the discharge of the functions of any one, or of all, of the great departments of government, the executive, the legislative, and the judicial. The officers of each of these departments are equally bound by their oaths of office to support the Constitution of the United States, and are, therefore, conscientiously bound to abstain from all acts which are inconsistent with it. Whenever, therefore, they are required to act in a case not hitherto settled by any proper authority, these functionaries must, in

the first instance, decide each for himself, whether, consistently with the Constitution, the act can be done."

An officer of the government, whose duty it is to see to the enforcement of the law, having sworn to support the Constitution, in determining what his duties are, must look not only to the law upon the statute book, but also to the Constitution, which is the fundamental law upon which all statutes rest, and when there are Acts of Congress and provisions of the Constitution relating to the same subject, it is his duty to consider and construe the same together.

The case of *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S., 727; 28 L. ed., 1137, was a suit brought by an Ohio corporation against parties residing and doing business in Colorado, to recover the price of certain machinery manufactured in Ohio, and sold and delivered in Colorado.

It appeared that the Constitution of Colorado contained this provision: "No foreign corporation shall do any business in this State without having one or more known places of business, and authorized agent or agents in the same, upon whom process may be served."

In accordance with this provision of the Constitution the Legislature of Colorado had passed an Act requiring foreign corporations, before they were authorized or permitted to do business in the State, to appoint an agent, etc., but this Ohio corporation had never taken any steps whatever to comply with this statute of Colorado. The defense interposed was that the plaintiff corporation had not complied with the laws of Colorado with reference to foreign corporations doing business in the State. The defendants prevailed in the trial court, and in passing upon this question this Court (28 L. ed., 1138) said:

"The right of the people of a State to prescribe generally, by its Constitution and laws, the terms upon

which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this Court. The plaintiff in error does not deny this right, but insists that upon a proper construction of Section 10 of Article 15, of the Constitution of Colorado, and of Section 23 of the Act of 1877, its contract with the defendants was valid, and that its suit should have been maintained.

"As the clause in the Constitution and the Act of the Legislature relate to the same subject, like statutes *in pari materia,* they are to be construed together."

To the same effect is the case of *Billingsley* v. *State,* 14 Md., 369, 376. It can not be denied that this provision of the Constitution which forbids Congress from levying a tax upon articles exported and the Act of June 6, 1896, with reference to filled cheese, relate to the same subject as the Act in question, was a revenue measure pure and simple, and was passed for the sole purpose of regulating the manufacture and sale of filled cheese, and of fixing an internal revenue tax thereon. There can be no question, therefore, that under the authorities above cited the provision in the Constitution and the Act itself should be construed together.

It is a well established principle, and has been frequently applied by this Court, that statutes *in pari materia* should be construed together.

In the case of *Ryan* v. *Carter,* 93 U. S., 84; 23 L. ed., 807, 809, the Court said:

"If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the Act of 1807, which is *in pari materia.* Congress passed various laws from time to time respecting the claims to lands in the Territories of Orleans and Louisiana. These laws were modified as policy required; but they constitute one land sys-

tem, are all *in pari materia*, and are to be looked to as one statute in explaining their meaning and import."

To the same effect are *Doe ex. Dem. Patterson* v. *Winn*, 11 Wheat., 380, 386; 6 L. ed., 500.

Atkins v. *Fiber, etc.*, 18 Wall., 301; 21 L. ed., 841, 844.

See also:

The Sloop Elizabeth, 1 Pain, C. C. R., 11; 8 Fed. Cas., 468.

Potter's Dwarris on Statutes, p. 189, and note.

Smith's Commentaries on Statutory and Constitutional Construction, p. 751.

In considering this provision of the Constitution in connection with the Act in question, the Court should also bear in mind that all revenue laws are liberally construed, not only in favor of the Government, in order to prevent frauds upon the revenue, but also against the Government and in favor of parties taxed, so as to carry out the intention of the Legislature.

Cliquot v. *U. S.*, 3 Wall., 114; 18 L. ed., 116, 121.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

U. S. v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244.

It is also a rule of construction to be applied in cases of this character that the Court will restrain the operation of a statute within narrower limits than its words import if the Court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it. This rule applied in construing Sec. 9 of the filled cheese Act, in connection with this provision of the Constitution, will restrain the operation of

the first clause of that Section, viz.; "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound to be paid by the manufacturer thereof," within narrower limits than its language imports in order than the Act shall not violate this constitutional provision.

The following cases support this proposition:

Lessee of Brewer v. *Blougher,* 14 Pet., 178, 198; 10 L. ed., 408, 418.

Oates v. *National Bank,* 100 U. S., 239, 244; 25 L. ed., 581.

U. S. v. *American Bell Tel. Co.,* 159 U. S., 548; 16 Sup. Ct. Rep., 70.

McKee v. *U. S.,* 164 U. S., 287; 17 Sup. Ct. Rep., 93, 95.

Woolridge v. *McKenny,* 8 Fed. Rep., 650, 659.

There is also another principle of construction applicable and that is that where there are two acts or provisions, one of which is special or particular, and the other general, if the general provision taken alone, involves the same matter as the special provision, and therefore is in conflict with it, the special provision must be taken as an exception to the general.

The case of *Rodgers* v. *U. S.,* 185 U. S., 83; 22 Sup. Ct. Rep., 582, involved a construction of two conflicting provisions in an Act approved March 3, 1899, and entitled "An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and Marine Corps of the United States," one of which was special and particular, and the other general.

In that case the Court said:

> "This case involves a mere question of statutory construction. The matter of military and naval salaries

is one exclusively within the control of Congress. The Courts may neither increase nor decrease them, correct any supposed inequalities, nor in any manner set aside or modify the action of the legislative branch of the government in respect therto. If there be inequality, injustice, it can be corrected alone by Congress, and the Courts may not interfere.

"The primary rule of statutory construction is, of course, to give effect to the intention of the Legislature. Whenever that is apparent it dominates and interprets the language used. But when the intent is a debatable question, and there is nothing on the face of the statute which clearly indicates such intent, there are certain minor and subsidiary rules by which courts are guided in determining the true construction.

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include the matter provided for in the special, the fact that the one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

In that same case the Court quoted with approval the language of Mr. Justice Christiancy in the case of *Crane* v. *Reeder*, 22 Mich., 322, 334, as follows:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an excep-

tion to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict."

See also *Ex parte Crow Dog,* 109 U. S., 556, 570.

Black on Interpretation of Laws, 116.

Sedgwick on the Construction of Statutory and Constitutional Law, 98.

The application of the above principle to this case must be apparent. The constitutional provision in question is that "no tax or duty shall be laid on articles exported," while the provision of Section 9 of the filled cheese act is "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound to be paid by the manufacturer thereof." The provision of the Constitution here is specific that "no tax or duty shall be laid," while the provision of Section 9, as above quoted, is general that a tax shall be laid on all filled cheese manufactured, etc. The special provision of the Constitution being an exception to the general provision of this Act, the two must be construed together as a requirement that upon all filled cheese which shall be manufactured, *except* such filled cheese as shall be exported, there shall be assessed and collected a tax, etc.

Still another principle of construction applicable to this case is that where a law requires two repugnant and incompatible things which are incapable of receiving a literal construction some change of language must be sustained in order to render the law intelligible; and where one of such repugnant requirements is special and particular and the other general in its terms, additional words of qualification may be added as a limitation upon the general

provision, but such words of limitation are never applied to the special provision.

The first part of this rule is very aptly stated by Mr. Chief Justice Marshall in the case of *Huidekoper's Lessee* v. *Douglass,* 3 Cranch. 1, 66; 2 L. ed., 347, 368, and the second part by Mr. Justice Brewer in the case of *Rodgers* v. *U. S.,* 185 U. S., 83; 22 Sup. Ct. Rep., 582, 584.

In the former case the Court said:

> "The law requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the Legislature, as manifested by themselves. The reading, suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of 'and residing, or causing a family to reside thereon,' *shall reside,* etc. The effect of this correction of language will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that in the view of the Legislature, the settlement, and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement."

In the other case the Court, in referring to the two conflicting provisions of the act involved, one of which was special and particular, and the other general, as already stated, said:

> "But it is said that harmony between the two may be obtained by limiting the operation of the special

> provision to the period between the passage of the act and the 30th, of June following. But that necessitates adding something to the words of the special provision, so that it shall read that from the date of the act until the 30th of June following such should be the rule in respect to the salaries of the recently promoted commodores. But the same harmony can be obtained by adding to the general provision a clause like this: Except in respect to the nine lower numbers of the grade of rear admiral. In either case the harmony is secured by adding some words of qualification, and the rule, as we have seen, is to the effect that the additional words of qualification are to be put to the general provision rather than to the special."

In applying this rule of construction, Section 9 of the Filled Cheese Act must be construed to mean "that upon all filled cheese which shall be manufactured *and not exported*, there shall be assessed and collected a tax of one cent per pound," etc. It must have been the intention of Congress that this act should be so construed. All acts of Congress are of necessity passed with reference to provisions of the Constitution, and it can not be presumed that Congress intended this act to be a violation of the Constitution, but rather that it should be construed in connection with or in the light of the Constitution, and therefore, Congress could only have intended by this act to lay a tax upon all filled cheese manufactured *which was not exported.*

This construction should be adopted, not only because it would be in full harmony with the foregoing rules and authorities; but also because any other construction would make the Filled Cheese Act unconstitutional and the courts, so far as possible, avoid a construction which will make an act unconstitutional.

> *U. S.* v. *Coombs,* 12 Pet., 72; 9 L. ed., 1004, 1006.

U. S. v. *Cent. Pac. Ry. Co.*, 118 U. S., 241; 30 L. ed., 175.

Hooper v. *People*, 155 U. S., 657; 15 Sup. Ct. Rep., 211.

Grenada Co. v. *Brown*, 112 U. S., 261; 28 L. ed., 704.

Parsons v. *Bedford*, 3 Pet., 433, 449; 7 L. ed., 737.

The case of *Rector*, etc., *of Holy Trinity Church* v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, involved a construction of the alien contract labor law (23 Stat. at L., 332). It appeared in that case that the Holy Trinity Church, a New York corporation, in September, 1887, entered into a contract with E. Walpole Warren, who was then an alien residing in England, under which said Warren was removed to the City of New York, and became a pastor of the church. It was contended that this contract was a violation of the alien contract labor law. In passing upon the question involved the court said:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in *Stradling* v. *Morgan*, Plow. 205: 'From which cases it appears that the sages of the law heretofore have con-

strued statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances."

See also *U. S.* v. *Hogg*, 112 Fed. Rep., 909; 50 C. C. A., 608.

(4)

The Court, in construing a doubtful statute, will consider:

(a) *The title of the Act.*

While the title of an act will not change or vary its plain provisions in the absence of conflict, it is always considered in cases involving conflict and cases in which the intention is shrouded in uncertainty.

U. S. v. *Fisher*, 2 Cranch., 358, 387; 2 L. ed., 304, 313.

U. S. v. *Palmer*, 3 Wheat., 610, 631.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

Holy Trinity Church v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, 513.

Hadden v. *the Collector*, 5 Wall., 107; 18 L. ed., 518.

U. S. v. *Trans. Mo., etc., Assn.*, 166 U. S., 290; 17 Sup. Ct. Rep., 540, 553.

Price v. *Forest*, 173 U. S., 410; 19 Sup. Ct. Rep., 434, 440.

Coosaw Mining Co. v. *State of South Carolina*, 144 U. S., 550; 12 Sup. Ct. Rep., 659.

The Act here involved is entitled "An Act Defining Cheese, also Imposing a Tax Upon and Regulating the Manufacture, Sale, Importation and *Exportation* of Filled Cheese."

Section 1 of the Act defines the word "cheese," and the second section defines "filled cheese." Section 9 of the Act imposes a tax upon filled cheese; section 5 regulates the manufacture of filled cheese; section 3 regulates the sale of filled cheese; section 11 regulates the importation of filled cheese; but the *exportation* of filled cheese is nowhere mentioned or referred to in the Act except in the title. Inasmuch, however, as *exportation* is mentioned in the title Congress must have had in mind the fact that filled cheese is sometimes exported, and it must follow that the reason exportation is not mentioned in the body of the Act is that it is already covered by constitutional provision.

(b). *The act as a whole, including all its provisions.*

In the case of *U. S.* v. *Fisher*, 2 Cranch., 358, 386; 2 ..., 304, 313, Mr. Chief Justice Marshall, in delivering the opinion of the Court, said:

> "It is undoubtedly a well established principle in the exposition of statutes that every part is to be considered, and the intention of the Legislature to be extracted from the whole."

Viewing this Act in the light of this rule we find that Section 9 fixes the amount of the tax to be paid upon filled cheese, and also contains this provision: "The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, effacement and destruction of stamps relating to tobacco

and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

Section 10 of the Act has the following provision: "That whenever a manufacturer of filled cheese sells, or removes for sale or consumption any filled cheese *upon which the tax is required to be paid by stamps without paying such tax,* it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid and to make an assessment therefor, and to certify the same to the Collector."

Section 16 of the Act is as follows:

> "Upon all packages of filled cheese *subject to tax under this Act* that shall be found without stamps or marks, as herein provided, * * * shall be forfeited to the United States."

If Congress did not intend that there should be exceptions to the assessment and collection of the tax provided and fixed in Section 9; and if it did not contemplate exportation of filled cheese which, under the Constitution would be exempt from taxation, why was reference made in Section 10 to filled cheese *upon which the tax is required to be paid by stamps,* and in Section 16 to filled cheese *subject to tax under this Act?*

If Congress had intended that all filled cheese manufactured should under any and all circumstances, be taxed in accordance with the provisions of Section 9, surely there would have been no occasion in other portions of the Act to have referred to filled cheese *upon which the tax is required to be paid by stamps,* since there was no other means provided by which the tax might regularly be paid; and as there is no provision anywhere in the Act for the exemption

of any filled cheese from the payment of the tax, it must follow that the only exemption which Congress at the time contemplated was the exemption already provided by law.

In the case of *United States* v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244, which was a case involving a forfeit under an internal revenue law, the Court considered various sections of the Act in determining the extent to which Congress intended forfeiture should be enforced.

(5)

It was a duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax.

Section 18 of the Filled Cheese Act provided that the commissioner of internal revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of said act.

Under the provisions of this section the commissioner could have made a regulation whereby an exporter of filled cheese, upon the removal of the same from the factory for exportation, might be required to furnish proper bonds to indemnify the government from any loss which might result from a failure to export the same. Under a regulation of this character the government would have been fully protected against frauds, and such a regulation would have properly carried into effect the provisions of the act.

The court will observe that the act does not provide, as most internal revenue acts do, that this tax shall be paid and the stamp affixed before the product is removed from the factory, and consequently there is nothing in the language of the act which would prevent the commissioner from making a suitable regulation for exportation without violating even the strict letter of the act.

As illustrating the extent to which the government could have been protected against frauds by such a regulation, we call attention to one of the regulations promulgated by the commissioner, which is as follows:

> "Every manufacturer of filled cheese is required to enter daily in a book (form 396) the quantity of materials used for the production of filled cheese, the quantity of materials otherwise used, the number of packages and pounds of filled cheese produced, the number of packages and pounds of filled cheese sold or removed, and the name of the place of business or residence of each person to whom sold or consigned. Model blank form furnished by the Commissioner of Internal Revenue.
>
> This book must always be kept at the manufactory, and be always open to the inspection of any internal revenue officer or agent."
>
> (Regulations Concerning Filled Cheese, Series 7, No. 22, p. 19.)

This regulation afforded an easy method of tracing the entire product of every factory, and if to this regulation the commissioner had added another in effect requiring the manufacturer to give bond to the government, covering the amount of the tax on each consignment exported so conditioned that it should become void upon the exporter furnishing satisfactory proof that such consignment had actually been delivered and sold in a foreign country, filled cheese exported could thus have been lawfully exported without the payment of the tax.

The making of such a regulation was within the power of the commissioner, and it was clearly his duty under the law, to make such regulation for the reason, as we have already seen, that he was bound by his oath to support the Constitution, and the Constitution, as a rule of action gov-

erning his conduct, was quite as binding upon him, or even more so, than any act of Congress.

But instead of promulgating regulations for the proper enforcement of the law, he promulgated the following:

> "The tax of 1 cent per pound imposed by Section 9, of the Act of June 6, 1896, upon all filled cheese manufactured, must be paid by the manufacturers thereof.
>
> "Under the law this tax must be represented by coupon stamps. Such stamps have been prepared in denominations of 10, 20, 30, 40, 50, 60, 70, 80, 90 and 100 pounds with nine coupons, each representing one pound, attached to each stamp, and are obtainable upon application on Form 391 to the collector of the district in which the factory is located.
>
> "The tax-paid stamp must bear the signature of the collector and show thereon the date of payment of the tax, the number of pounds, the number of the factory, and the name of the person by whom or for whom it was canceled.
>
> "On the withdrawal of a package the proper tax-paid stamp must be affixed thereto by the manufacturer in the same manner as the label."
>
> (Regulations Concerning Filled Cheese, Series 7, No. 22, p. 18.)

This regulation, it will be observed, instead of enabling a manufacturer to export his product without the payment of the tax, as the law required, absolutely deprived him of the privilege, because the regulation made it impossible for him to remove the product from his factory without first paying the tax.

Regulations of the department may be made in order to aid in carrying the law as it exists into execution, but they cannot change its positive provisions.

The case of *Morrill* v. *Jones,* 106 U. S., 466; 27 L. ed.,

268, involved a regulation of the Treasury Department, which was made with reference to the importation of live stock. An act of Congress provided that animals especially exported for breeding purposes from beyond the seas, should be admitted free of duty, and the Treasury Department had made a regulation to the effect that before such animals should be admitted free the collector should, among other things, "be satisfied that the animals are of superior stock adapted to improving the breed in the United States."

In passing upon this regulation the court said:

> "The Secretary of the Treasury can not, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of the breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. This is not the office of a treasury regulation."

See also

U. S. v. 200 *Barrels of Whiskey,* 95 U. S., 571; 24 L. ed., 491.

Campbell v. *U. S.,* 107 U. S., 407; 27 L. ed., 593.

II.

IF THE COLLECTOR, UNDER THE STRICT LETTER OF THE ACT OF JUNE 6TH, 1896, WAS REQUIRED TO LEVY AND COLLECT THE TAX IN QUESTION, THEN THE ACT IS UNCONSTITUTIONAL.

From what has already been said it would seem to follow as a natural sequence that if the collector, in the discharge of his duties, was bound to follow the strict letter of the Filled Cheese Act, regardless of the provisions of the Constitution, then the act itself, or at least Section 9 of the act, is unconstitutional in that it fails to make any provision whatever for the exportation of filled cheese without the payment of the tax.

The case of *Pace* v. *Burgess*, 92 U. S., 372; 23 L. ed., 657, 659, has already been referred to, and the only inference to be drawn from that case is that, if the export stamp, required by Congress to be affixed to all goods intended for export, and for which the manufacturer was required to pay a nominal price, could have been regarded as a tax instead of a mere fee for a mark of identification to distinguish goods intended for domestic use and consumption from goods intended for exportation, then that act would have been held by the court as unconstitutional; and it will be observed that the controlling fact in that case, which led the court to that conclusion, was that the nominal price charged for the so-called export stamp had no reference whatever to the size, quantity or value of the package, and that the price which the manufacturer was required to pay for such stamps was barely sufficient to cover the expense to the government for inspection, and the expense of such supervision and regulation as was necessary in order to protect itself against fraud and imposition.

The nominal price charged for these export stamps was

referred to by the court as a fee designed to cover the expense of inspection, etc., and when the court said "The point to guard against is the imposition of a duty under the pretext of fixing a fee" the court in effect said that if the amount charged for the stamp could in any sense have been regarded as a duty or a tax instead of a mere fee, the act would have been regarded and held as unconstitutional.

What has already been said about the case of *Fairbanks* v. *United States*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 651, 652, 653, applies with equal force to this question. In that case it will be remembered that a provision in the Spanish War Revenue Act requiring a ten cent stamp to be affixed to a foreign bill of lading, was held to be in derogation to this clause of the Constitution and, therefore, void, the court reaching the conclusion, after an elaborate discussion of the question, that a tax upon a bill of lading was in fact a tax upon the goods shipped under such bill of lading.

In the case of *Dooley* v. *U. S.*, 183 U. S., 151; 22 Sup. Ct. Rep., 62, 69, already referred to, and as we have already said, this clause of the Constitution was frequently referred to, both in the majority and dissenting opinions. The court, however, was not divided in its opinion as to this clause of the Constitution, the difference between the majority and the dissenting opinions having reference to questions which in no way affect this case.

As to this clause of the Constitution and the power of Congress to levy any tax upon articles exported, Mr. Chief Justice Fuller, in delivering the dissenting opinion, said:

> "Clauses 5 and 6 of paragraph 9 provide:
>
> " 'No tax or duty shall be laid on any articles exported from any state.'
>
> " 'No preference shall be given to any regulation of

commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.'

"These provisions were intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another. The regulation of commerce by a majority vote, and the exemption of exports from duties or taxes, were parts of one of the great compromises of the Constitution.

"If, after the cession, Porto Rico remained a foreign country, the prohibition of clause 5 would be fatal to these duties; while if Porto Rico became domestic, then as they are customs duties, they could not be sustained, according to *Woodruff* v. *Parham*, under the first clause of paragraph 8; and were also prohibited by clause 5 of paragraph 9, whether customs duties or not, if the application of that clause is not limited to foreign commerce.

"The prohibition that 'no tax or duty shall be laid on articles exported from any state' negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a state, *irrespective of their destination*, and, this being so, the act, in imposing the duties in question is invalid, whether Porto Rico after its passage was a foreign or reputed foreign territory, a domestic territory, or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations.

* * * * * * * *

"Again, if in any view these duties could be treated as other than custom duties the result would be the same, inasmuch as the goods were articles exported from New York, and there was a total lack of power to lay *any* tax or duties on such articles.

"The prohibition on Congress is explicit, and noticeably different from the prohibition on the states. The state is forbidden to lay 'any imposts or duties'; Con-

gress is forbidden to lay 'any tax or duty.' The state is forbidden from laying imposts or duties 'on imports or exports'; that is, articles coming into or going out of the United States. Congress is forbidden to tax 'articles exported *from any state*.'"

See also *Marbury* v. *Madison,* 1 Cranch., 178; 2 L. ed., 74.

We have already referred to the cases of *Coe* v. *Errol* and *Brown* v. *Houston,* and have endeavored to show that they have no application in construing this act in connection with the Constitution. The power of a state to tax or control property within its borders ceases when transportation of such property to another state or country commences, because the property then comes under the control of Congress by virtue of the power granted in the Constitution to regulate commerce between the states and foreign countries. The power of Congress over such property, however, is the same after transportation has actually commenced that it was before, because Congress has sole power to regulate commerce, and, therefore, if Congress has any power to lay and collect a tax on articles exported, it has the same power after transportation and exportation have actually commenced that it had before.

It will probably be conceded that under an act of congress a tax could not be laid and collected on articles exported after exportation had actually commenced, and even if it does not therefore follow that no such tax could be laid or collected before exportation had actually commenced, it certainly must follow that cases involving questions of interstate commerce have absolutely no application.

It has already been remarked that all internal revenue acts passed by Congress since the establishment of the internal revenue department, with the exception of this Filled

Cheese Act, made suitable provisions whereby the property taxed might be exported without payment of the tax, or that a tax already paid should be refunded in the form of a drawback after exportation. Internal revenue acts passed subsequent to the Filled Cheese Act, as well as prior thereto, contain such provisions.

It is a well settled principle that by these provisions Congress has placed a construction upon its own powers under the Constitution to lay any such tax upon articles exported, and such construction is binding and should be given great weight by the court in determining the constitutionality of this act.

Stuart v. *Laird,* 1 Cranch., 299; 2 L. ed., 115.
Burlow-Giles Lith. Co. v. *Sarony,* 111 U. S., 53; 28 L. ed., 249; 4 Sup. Ct. Rep., 279.
The Laura, 114 U. S., 411; 29 L. ed., 147; 5 Sup. Ct. Rep., 881.
U. S. v. *Filbrick,* 120 U. S., 52, 59; 30 L. ed., 559, 561; 7 Sup. Ct. Rep., 415.
U. S. v. *Hill,* 120 U. S., 169, 182; 30 L. ed., 627, 632; 7 Sup. Ct. Rep., 510.
Robertson v. *Downing,* 127 U. S., 607 to 613; 32 L. ed., 269, 271; 8 Sup. Ct. Rep., 1328.
Schell v. *Fauche,* 138 U. S., 562, 572; 34 L. ed., 1040, 1043; 11 Sup. Ct. Rep., 376, 380.

The uniformity with which Congress has made provisions in internal revenue acts for exportation without payment of tax not only indicates the construction which Congress has always placed upon this provision of the Constitution, but it also indicates that it was by some inadvertence or oversight that a provision with reference to exportation was omitted from this act.

In either case the act should be held unconstitutional as

violating this restriction upon the power of Congress that "no tax or duty shall be laid on articles exported from any state."

Respectfully submitted,

CHARLES E. KREMER,
Attorney for Plaintiffs in Error.

WILLIAM E. MASON,
LEWIS F. MASON,
CHARLES W. GREENFIELD,
Of Counsel.

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JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 116.

C. W. CORNELL and F. B. CORNELL, copartners doing business under the name of Cornell Brothers,
Plaintiffs in Error,

vs.

F. E. COYNE, late United States Collector of Internal Revenue, First District of Illinois,
Defendant in Error.

Additional Brief and Argument for Plaintiffs in Error.

WILLIAM E. MASON,
Attorney for Plaintiffs in Error.

CHARLES W. GREENFIELD,
LEWIS F. MASON,
Of Counsel.

Geo. Hornstein Co., Printers, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 118.

C. W. CORNELL and F. B. CORNELL, copartners doing business under the name of Cornell Brothers,
Plaintiffs in Error,

vs.

F. E. COYNE, late United States Collector of Internal Revenue, First District of Illnois,
Defendant in Error.

Additional Brief and Argument for Plaintiffs in Error.

The Rules of the Department compelling the payment of one cent per pound in addition to the special manufacturers' tax on filled cheese, which was intended for export, before it leaves the factory, is in violation of the act of Congress of June 6th, 1896, known as the Filled Cheese Act.

The title of the act itself is an act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation and *exportation* of filled cheese.

The only attempt in the act to provide for exporting filled cheese is found in Section 9, as follows:

"The tax levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing the engraving, *issue*, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, so far as applicable, are hereby made to apply to stamps provided for in this section."

We call attention to the fact that the tax is represented by the stamps, and respectfully submit that any variation as to the issue or sale of such stamps in the then existing law would necessarily mean a variation in the tax levied.

To illustrate: If the law said, that all filled cheese containing colored matter would require, in addition to the other stamps required herein, a one dollar stamp on each package, it would mean an additional tax of one dollar, although it would be called an additional stamp.

If the law had stated that all filled cheese in less than pound packages, duly marked according to law, would be furnished free by the department, with a stamp indicating that it contains less than a pound, that would simply mean that no cash stamp being required, no tax was being levied. And, therefore, when the law provides, as it does in the adopted section, that filled cheese intended for immediate export may, under proper conditions, be relieved from the payment of the one cent stamp, by placing a free stamp thereon, indicating that it is for immediate export, it means that the package for immediate export, requiring no cash stamp, is relieved from taxation.

The stamp required under section 3385 on tobacco and snuff, by the act of '96, is furnished by the department free for all exported packages of tobacco and snuff. It is an engraved stamp provided for in the last mentioned section, and on its face reads as follows:

Tobacco and Snuff
for immediate
Exportation.

No. .... Series A-1883
Issued to.....
By.....
Coll—Dist .....
Manufactured tobacco ..... lbs.
Snuff ..... lbs
Affixed and cancelled ..... 18..
..... Inspector.
United States Internal Revenue.
Bureau of Engraving and Printing.

The law then existing relating to the stamps issued for tobacco and snuff, and which Congress made a part of the so-called Filled Cheese Law, is as follows:

"Section 3385. Manufactured tobacco, snuff and cigars intended *for immediate exportation* may, after being properly inspected, marked and branded, be removed from the manufactory in bond *without having affixed thereto the stamps indicating the payment of the tax thereon.* The removal of such tobacco, snuff and cigars from the manufactory shall be made under such regulations, and after making such entries, and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. There shall be affixed to each package of tobacco, snuff and cigars intended for immediate export, before it is removed from the manufactory, *an engraved stamp indicative of such intention.* Such stamp shall be provided and furnished to the several collectors as in the case of other stamps, and they shall account for the use of the same. When the manufacturer has made the proper entries, filed the bonds, and otherwise complied with the requirements of law and regulations as herein

provided, the collector shall issue to him a permit for the removal. * * *"

The construction we contend for then is that the law is as above quoted, and should read: "Manufactured tobacco, snuff, *and filled cheese* intended for immediate exportation may, after being properly inspected, marked and branded, be removed from the manufactory in bond without having affixed thereto the stamps indicating the payment of the tax thereon," by simply affixing an engraved stamp indicative of such intention, which under the law is furnished free. It is admitted by the demurrer that the plaintiff in error notified the government that they had these articles on hand for immediate export.

It is common and proper for the legislative branch to adopt the existing law, and by special provision make it a part of new and additional laws upon similar subjects. No plainer case can be quoted than the present act under consideration, which in Section 3 provides for a special tax, known as the special manufacturers' license or tax of four hundred dollars per annum on every factory, and being satisfied with the law then in force as to special taxes, said Section 3 adopts, so far as is applicable, Sections 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241 and 3243, then in force as a part of the Filled Cheese Act, and the department adopt those sections and are governed by them.

The title also provides for the regulation of the sale and the only provision in the body of the act provides that the wholesale dealer shall pay $250 per annum, and the retail dealer $12 per annum, and adopts ten sections of the then law, 3232 to 3243, both inclusive, as a part of the law regulating the sale of filled cheese, which is also adopted by the department, the same as if it had been bodily incorporated in the Act of 1896, known as the Filled Cheese Act.

The title of the act announces the intention to regulate manufacturing and sale and the only regulation as to manufacturing or sale is found in the then existing law, adopted by Congress as a part of the Filled Cheese Act. What is true as to the manufacturing and sale is also true as to the exportation. The title of the act assumes and asserts that it will provide for the exportation, and the only effort of the act itself to conform to the title upon the subject of exportation is the adoption of Section 3385 of the Statutes then in force, which provides for the exportation of tobacco by affixing a free stamp indicative of its purpose. It is, to say the least, remarkable that the department by its rules and regulations cheerfully adopts ten sections of the then existing law in regard to special taxes, which produces revenue. It adopts old law as to license of wholesale and retail dealers and utterly refuses to adopt one section which might reduce the revenue as to sale and issue of stamps for exported articles, although the act itself, in the title, and in the body of the act makes the same attempt to adopt the only section providing for stamps for exportation as it does for adopting the ten sections providing for manufacture and sale.

In brief, while the title of the act says it will regulate four things, viz.: the *manufacture, sale, importation and exportation* of filled cheese, the body of the act is silent as to three things, viz.: the manufacture, sale and exportation of filled cheese, except as it adopts as a part of the act, the then existing law as to manufacture, sale and exportation of other articles specially taxed by the government. And the department regulation adopts the then existing law which became (by the Filled Cheese Act) part of the act itself, as to the *manufacture* and *sale*, but refused to adopt as part of that law the provisions of the then existing law in regard to

sale and issue of export stamps on tobacco, which was adopted by the act of Congress, in just as plain and unmistakable terms as it did for the provision of the manufacture and sale.

We ask that the department should be directed to apply the same rule of construction in adopting for its rules Section 3385 as they do in adopting for its rules the ten sections as to manufacture and sale. This construction would put the department rules in harmony with the statute; in harmony with all of the other laws, then in force at that time upon the subject of stamping exporting goods upon which the government had levied this special tax; it would put the law in harmony with its own title, and better than all that it would put it in harmony with the constitution, which provides that the government shall not levy a tax or duty on articles exported.

WILLIAM E. MASON,
Attorney for Plaintiffs in Error.

CHARLES W. GREENFIELD,
LEWIS F. MASON,
Of Counsel.

Office Supreme Court U. S.
FILED
JAN 13 1904
JAMES H. McKENNEY,
Clerk.

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BRIEF IN BEHALF OF DEFENDANT IN ERROR.

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STATEMENT.

This is a writ of error to the circuit court of the United States for the northern district of Illinois, seeking reversal of the judgment of that court sustaining a demurrer to plaintiffs' declaration, wherein they asked to recover from defendant certain sums of money paid for revenue stamps purchased of him, while acting as United States collector of internal revenue, and placed upon packages of filled cheese manufactured by them

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in the State of Illinois and exported under contracts therefor made before the process of manufacture began.

By act of June 6, 1896 (29 Stat., 253, C. 337), the Congress defined filled cheese, and provided:

> SEC. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

The act does not exempt from the tax cheese exported, nor does it provide for drawbacks of the amount paid thereon when the same are actually shipped out of the country. No discrimination is made against such filled cheese as may be intended for export, but all filled cheese manufactured in the United States is treated in precisely the same way whether it be for export or domestic consumption.

Section 3385 of the Revised Statutes provides:

> Manufactured tobacco, snuff, and cigars intended for immediate exportation may, after being properly inspected, marked, and branded, be removed from the manufactory

> in bond without having affixed thereto the stamps indicating the payment of the tax thereon. The removal of such tobacco, snuff, and cigars from the manufactory shall be made under such regulations, and after making such entries and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury; there shall be affixed to each package of tobacco, snuff, and cigars intended for immediate export, before it is removed from the manufactory, an engraved stamp, indicative of such intention. * * *

Proceeding under the act of June 6, 1896, defendant Coyne required plaintiffs to place upon all filled cheese manufactured by them, before shipment from the factory, coupon stamps at the rate of 1 cent per pound, notwithstanding it was made under a contract for immediate exportation and was about to be sent abroad. They claim the imposition and collection of such a tax was not authorized by the statute, and if authorized, it is in violation of the Constitution.

In their declaration (Rec., 4)

> Plaintiffs aver that at various times subsequent to the said 1st day of August, A. D. 1897, and prior to the 1st day of April, 1901, the plaintiffs entered into various contracts in London and Liverpool, England, under

and by the terms of which they agreed to manufacture, at their said factory, in the district aforesaid, certain large quantities of filled cheese, and export and deliver the same in Liverpool and London, in the Kingdom of Great Britain, in certain fixed quantities and at certain intervals and periods of time covered by and mentioned in said contracts; that no filled cheese was at any time after the said 1st day of August, A. D. 1897, and prior to the said 1st day of April, A. D. 1901, manufactured by the plaintiffs in said district, or elsewhere, except under contracts made and entered into by the plaintiffs as aforesaid, and that under and in pursuance of said contracts plaintiffs did from time to time subsequent to the 1st day of August, A. D. 1897, and prior to said 1st day of April, A. D. 1901, manufacture large quantities of filled cheese, to wit, 1,580,479 pounds thereof, all of which was shipped directly from plaintiffs' factory, in the district aforesaid, and exported by them to London and Liverpool, and the same was sold in and consigned direct to markets and countries wholly without the United States.

They further aver (Rec., 5)—

That each quantity or installment of filled cheese manufactured, exported, and delivered by the plaintiffs under said contracts was forwarded by the plaintiffs as soon as the same was ready for shipment from their factory in said district, and prior to the shipment thereof the plaintiff applied to the

defendant, as such collector, for permission to ship and forward the same without purchasing and attaching to said filled cheese, or to the said packages containing the said filled cheese, the revenue stamps required by an alleged act of Congress, approved June 6, A. D. 1896, with reference to internal revenues; but notwithstanding the fact that such filled cheese was manufactured for export, and was about to be delivered by the plaintiffs for export and shipment to a foreign market, and notwithstanding the provisions of said section 9, article 1, of the Constitution of the United States, the defendant, assuming to act as such collector of the said internal-revenue district, and assuming and pretending to act under and by virtue of said alleged act of Congress, approved June 6, A. D. 1896, did, at various times during said period, and on the dates of shipment of said filled cheese, by force and duress, exact, demand, and collect from the plaintiffs large sums of money, amounting in the aggregate to, to wit, $20,000, and upon the claim and under the pretext that the same was a general assessment as an internal-revenue tax upon the said commodities. That the plaintiffs objected and protested against the said requirement of said defendant; * * * but notwithstanding said protests repeated threats were made by the defendant to arrest and prosecute the plaintiffs, * * * unless the plaintiffs would immediately procure and purchase revenue stamps as required by the

said act, and attach the same to the said packages before delivering the same to be forwarded in the manner aforesaid; and governed wholly by said threats of arrest and prosecution, and not otherwise, said plaintiffs did make a written requisition upon the defendant as said internal revenue collector, for internal revenue stamps to be attached by them to the packages of filled cheese included in each of the said shipments, which said revenue stamps amounted in the aggregate to a large sum of money, to wit, the sum of $20,000.

The second count of the declaration alleges that plaintiffs were unlawfully compelled to place stamps "upon a certain commodity known as filled cheese, and manufactured by the plaintiffs for export trade, and which had theretofore been sold by them in foreign markets wholly without the United States, and which was ready to be delivered by the plaintiffs to be forwarded to be delivered in such foreign markets, at the time when the said internal revenue thereon had been wrongfully collected by the defendant."

Demand having been made for the return of the money paid for stamps, as provided by law, plaintiffs instituted this suit to recover the amount thereof.

A general demurrer to the declaration was sustained by the circuit court.

A writ of error was sued out and the case brought directly to this court as one "that involves the

construction or application of the Constitution of the United States."

Two contentions are presented by plaintiffs:

First—

Section 9 of the act of June 6, 1896, provides:

> The tax levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

Section 3385, Revised Statutes, provides that manufactured tobacco, snuff, and cigars intended for immediate export may be removed from the factory in bond without having affixed thereto the stamps indicating payment of tax, under such regulations as may be prescribed, and that to each package a stamp indicating the purpose to immediately export shall be affixed, etc.

Plaintiffs maintain that under said provisions they should have been permitted to withdraw filled cheese for export, without affixing revenue stamps, under the same terms and conditions that a manufacturer of tobacco could have sent out a package from his factory.

Second—

All the filled cheese produced by them was manufactured under and in compliance with their valid

contracts to make and export the same to England, and was ready and about to be delivered for such export and shipment to, and delivery in, a foreign market, when they were required to attach revenue stamps thereto. Therefore, they say, such cheese was included in the terms "articles exported from any State" upon which paragraph 5, section 9, article 1, of the Constitution provides "no tax or duty shall be laid."

The defendant denies both of these contentions.

ARGUMENT.

It was not the purpose of the act of June 6, 1896, to exempt from the tax imposed thereby filled cheese exported from any State.

Nowhere in the text of the act is there an intimation that filled cheese manufactured in the United States is under any circumstances to escape taxation. On the contrary, it provides (sec. 9):

> Upon *all* filled cheese which shall be manufactured there shall be assessed and collected a tax of 1 cent per pound, to be paid by the manufacturer thereof. * * *

The tax levied by section 9 it specifies shall be represented by coupon stamps. Then immediately follow directions as to the engraving, issue, etc., of such stamps in these words:

> The provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps re-

lating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

Section 16 provides for the forfeiture of all packages of filled cheese found without stamps.

Section 18 gives the Commissioner of Internal Revenue authority to make all necessary regulations for carrying the act into effect.

Section 3385 of the Revised Statutes provides for relieving manufactured tobacco, snuff, and cigars, intended for immediate export, from the stamp tax, specifying with considerable detail how such exemption is to be secured; and as evidence of such intent to immediately export directs that a peculiar stamp, to be furnished by the collector, be affixed to each package.

Sections 3369–3376, Revised Statutes, make provision for the engraving, issue, sale, accountability, effacement, and destruction of revenue stamps relating to tobacco and snuff, while section 3385, Revised Statutes, provides the method to be pursued when release from taxation of tobacco, etc., intended for export, is sought, the stamp to be affixed being merely indicative of such intention.

It seems manifest that section 3385, Revised Statutes, has no sort of applicability to the engraving, issue, sale, accountability, effacement, or destruction of excise stamps relating to tobacco and snuff, and certainly, as it in no way relates to any of these things, it can not be construed to apply to

revenue stamps designated by the act of 1896, and especially can not exempt from tax the very article which, without exception, said act subjects thereto.

The title and preamble of an act are no part of it and can not enlarge or confer powers or control the words of the same unless they are doubtful or ambiguous.

Yazoo and Miss. Val. R. R. Co. v. *Thomas*, 132 U. S., 174, 188.
Price v. *Forrest*, 173 U. S., 410, 427.

There is no doubt or ambiguity about the imposition of a tax upon *all* filled cheese manufactured in the United States by the act in question, and although its title may indicate a purpose to regulate *exportation* of filled cheese, there is, in fact, nothing in its body attempting to carry out any such purpose.

The principles laid down by this court in Turpin v. Burgess are decisive of the present controversy.

The act of Congress passed June 6, 1896 (29 Stat., 253, C. 337) imposes a tax upon *all* filled cheese manufactured within the United States, without discrimination, and makes no provision exempting therefrom, or granting drawbacks on account of any such cheese which may be exported. The tax takes effect while the articles are in the factory, before they start therefrom for domestic consumption, or in course of transporta-

tion; and it is not laid by reason of exportation or intended exportation.

Upon the authority of *Turpin* v. *Burgess* (117 U. S., 504, April 5, 1886), the validity of the tax now called in question seems beyond successful dispute. In that case suit was brought to recover from an internal-revenue collector the amount paid (25 cents each) for stamps affixed to certain cases of manufactured tobacco intended for exportation. Plaintiffs maintained the exaction was a tax and unconstitutional, being in violation of the paragraph which declares "no tax or duty shall be laid on articles exported from any State." The act of Congress passed July 20, 1868, imposed an excise tax of 32 cents per pound on manufactured tobacco, and required the same to be paid by purchasing stamps and affixing them to the packages before being removed from the factory; but tobacco intended for exportation was relieved from payment of this tax, provided there was affixed to each package, before removal, a stamp sold by the Government for 25 cents, engraved to indicate intent to export.

In the case of *Pace* v. *Burgess* (92 U. S., 372, 1875)—opinion by Justice Bradley—the questions raised in *Turpin* v. *Burgess* were before the court, and they were of opinion that the stamp required to be affixed was a means devised for the prevention of fraud, by separating tobacco intended for exportation, and that the requirement did not in

any proper sense impose a tax or duty thereon. After the decision of *Pace* v. *Burgess*, Congress abolished all charges for the exportation stamp by an act entitled "An act to repeal so much of section 3385 of the Revised Statutes as imposes an export tax on tobacco," and in the Turpin case it was argued that this language was an admission by Congress that the charge originally made for the stamp was an export tax, and the court was accordingly not bound by its former holding. This court, while refusing to depart from its first opinion as to the result of the requirement of an export stamp, gave an additional reason for denying the relief sought by the plaintiff. Justice Bradley, speaking for a unanimous court (p. 506), said:

> There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided, in *Coe* v. *Errol* (116 U. S., 517), that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of

transportation is no part of that transportation. Now, the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, "No tax or duty shall be laid on articles exported from any State." (Art. 1, sec. 9, par. 5.) In the other they are, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports." (Art. 1, sec. 10, par. 2.) The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States or of the State know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This can not for a moment be contended. It would not be true, and would lead to the greatest frauds.

It is true, as was conceded in *Coe* v. *Errol*, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign

countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another, it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other.

In the present case the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question they could not have complained. * * *

On both grounds we are satisfied that the plaintiffs are without any cause of action, and the judgment of the circuit court is affirmed.

Nothing said by this court since its decision, of which I am aware, has in any way modified or called in question the doctrine laid down in *Turpin* v. *Burgess*, and unless that be overruled the judgment of the circuit court in this case must be affirmed. The point relied upon there had been before the court in *Pace* v. *Burgess* (1875), *Brown* v. *Houston* (1885, 114 U. S., 622), and *Coe* v. *Errol*, Jan. 25, 1886 (116 U. S., 517), in each of which

Justice Bradley wrote the opinion of a unanimous court, and the language used was evidently the result of careful deliberation upon a point clearly raised.

Justice Miller, in his lectures on the Constitution (p. 593), says:

> The Congress of the United States during the late civil war imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol* (116 U. S., 517) and *Turpin* v. *Burgess* (117 U. S., 504) seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export.
>
> [The act of July 1, 1862 (12 Stat., 432), sec. 75 (p. 465), imposed a tax of one-half

cent per pound on cotton. Section 116 (p. 488) of the same act granted, upon exportation, an allowance or drawback of the tax paid on articles, "except raw or unmanufactured cotton." The act of March 7, 1864 (13 Stat., 14–16), raised the tax on cotton to 2 cents per pound.]

It is not possible to destroy the effect of the above-mentioned holding of the court in *Turpin* v. *Burgess* by calling it *obiter dicta*. The point was distinctly raised and insisted upon, and while there was another valid defense to the plaintiff's contention, it was eminently proper for the court to announce a second ground upon which its decision could be supported, and thus put a most important question in issue forever at rest. I know of no doctrine which permits a part of an opinion to be called *obiter dicta* and to be disregarded simply because there was another adequate ground for the decision, beside the one being then discussed.

In view of the fact that the tax upon filled cheese accrued immediately upon its manufacture—whether the same was intended for export or domestic consumption—and that no cheese could be removed without the payment of the prescribed tax, it seems that counsel for plaintiff is in manifest error when he says in his brief (p. 39) that "the taxes in this case were levied and collected at the times complained of simply be-

cause this filled cheese was about to be delivered to a transportation company to be exported to a foreign country."

The same tax would have been levied and collected before the cheese could have been delivered to a grocer whose shop adjoined the manufactory.

Early revenue laws did not recognize the doctrine contended for by plaintiffs in error, and taxed manufactured articles, although intended for exportation.

The first internal-revenue act after the Constitution went into effect (1 Stat., 199, C. 15) was passed March 3, 1791, at the third session of the First Congress. It imposed (sec. 15) upon spirits distilled within the United States a tax of 11 cents per gallon, and made elaborate provision for its collection. After providing for both tax and collection, the statute continued:

> And for the encouragement of the export trade of the United States:
>
> SEC. 51. *Be it further enacted*, That if any of the said spirits (whereupon any of the duties imposed by this act shall have been paid or secured to be paid) shall * * * be exported from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, by way of drawback, equal to the duties thereupon according to the rates in each case by this act imposed, deducting therefrom half a cent per gallon. * * *

Subsequent sections provided the drawback should not be paid until six months after the spirits were exported, and should be allowed in no case where they were shipped out in a vessel of less than 30 tons burden.

This bill "did not steal upon an unsuspecting legislature unobserved. Its principle was completely understood, and was opposed with equal zeal and ability." It will be observed that it did not wholly exempt distilled liquors intended for export from the effect of the tax, but clearly provides that one-half cent a gallon shall be collected upon the same; and the favor extended thereto was for the encouragement of the export trade of the United States. No one at that time seemed to think the act violated the provision of the Constitution prohibiting a duty or tax on articles exported.

By act of December 21, 1814 (3 Stat., 152, C. 15), the Congress laid an excise of 20 cents per gallon upon distilled spirits, and no provision was made to release therefrom spirits exported by grant of drawback or otherwise.

These two statutes, passed in the early days of the Government, are persuasive evidence that the provision of the Constitution in question (art. 1, sec. 9, par. 5) does not mean what counsel for plaintiffs contend. They both did what is now claimed to be unconstitutional, viz, laid a tax on manufactured goods, notwithstanding such articles may have been actually intended for, and were in

fact shipped out of the country. And the existence of these statutes negatives the suggestion contained in the brief of counsel for plaintiff in error (at p. 24) that the act of 1896 imposing a tax on filled cheese is "the only internal-revenue act ever passed by Congress which failed to provide for the exportation of the commodity taxed without the payment of the tax."

Mere intention or contract to export goods does not constitute them articles of commerce and make laying a tax upon them contrary to the provisions of the Federal Constitution.

What are "articles exported from any State," within the meaning of paragraph 5, section 9, article 1 of the Constitution, upon which "no tax or duty shall be laid?"

The verb "export," from the two Latin words, *ex*, out, and *portare*, to carry, is defined thus: "To carry or send abroad, or out of a country, especially to foreign countries, as merchandise or commodities in the way of commerce; the opposite of *import;* as, to *export* grain, cotton, cattle, goods, etc." (Webster's Inter. Dic.)

The word "exported" manifestly refers to an accomplished act, and can in no proper sense be construed to mean something merely intended or contracted to be done in the future. Articles exported are things which have been sent out, not those merely to be sent. The idea conveyed has

reference to something completed. If the legislature should impose a tax on all profits *gained* in business, no one would claim that it accrued until they were actually acquired, and an effort made to collect upon such as were expected or contracted for would appear very absurd.

In *United States* v. *Steamboat Forrester* (Fed. Cases, No. 15132), the court said:

> The term as used is import, and legislation employed that term in its commercial sense, which is to bring from a foreign jurisdiction into this jurisdiction merchandise not the product of the country. Its commercial meaning is directly contrary to the term export. Both phrases have a technical meaning in the law. We import teas from China, wine from France. We export cotton, tobacco, pork, and wheat. The one term signifies, etymologically, to bring in; the other, to carry out.

In *Muller* v. *Baldwin* (L. R. 9 Q. B., 457, 1874) the court, construing the meaning of a statute levying dues in respect of coals "exported from the port," said:

> There is nothing in the language of the act to show that the word "exported" was used in any other than its ordinary sense, namely, carried out of the port.

Paragraph 5, section 9, Article I of the Constitution provides: "No tax or duty shall be laid on articles exported from any State."

Paragraph 2, section 10, Article I, provides: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

An export is "a commodity conveyed from one country or State to another, in the way of traffic." (Webster's Dic.) It is necessarily an article exported from or carried out of a State or country.

In the first draft of the Constitution as reported to the convention of 1787 by the committee on detail, section 4 of Article VII provided: "No tax or duty shall be laid by the legislature on articles exported from any State;" and Article XIII provided, "No State, without the consent of the legislature of the United States, shall * * * lay imposts or duties on imports * * *."

The above provision denying to Congress power to tax exports was first taken up, and after elaborate argument in which it appears everybody understood the words "articles exported" to mean the same thing as "exports," was agreed to. (Elliot's Debates, vol. 5, 432, 433, 454, et seq.) It is plain from the debates that the prohibition was intended to prevent Congress from doing the same thing the States had long been accustomed to do in reference to goods actually shipped from their ports. Pennsylvania had exported the produce of Delaware and New Jersey, and Virginia

had shipped abroad tobacco raised in North Carolina; and both Pennsylvania and Virginia had levied export taxes on such articles from other States as well as from themselves before permitting shipment thereof. And it was in reference to these and similar well-known practices, which had long existed, that the provision was adopted.

Mr. Madison, in opposition to the proposed restriction on the power of Congress, said: "The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports, by authorizing its citizens to carry their commodities freely into a neighboring State which may decline taxing exports in order to draw into its channel the trade of its neighbors." (Elliot's Debates, vol. 5, p. 455.)

Mr. Gouverneur Morris, likewise in opposition to the restriction, said: "He considered the taxing of exports to be in many cases highly politic. Virginia has found her account in taxing tobacco. All countries having peculiar articles tax the exportation of them—as France her wines and brandies." (Elliot's Debates, vol. 5, 433.)

The thing in the minds of all in the convention was a tax levied because of exportation and at the time such exportation actually took place by shipment to a foreign State or country. If it had occurred to Mr. Madison that an article was an export and subject to tax as such by that State the moment a man in Virginia contracted to make and

ship it abroad, he could not have suggested that the tax could be avoided by sending the article out through the port of a State which laid no such tax.

When article 13 of the original draft was reached, it was, with little discussion, amended by adding after "imports" the words "or exports." "Mr. Madison liked the motion as preventing all State imposts," and "Mr. Gouverneur Morris thought the regulation necessary to prevent the Atlantic States from endeavoring to tax the Western States and promote their interest by opposing the navigation of the Mississippi, which would drive the western people into the arms of Great Britain." (Elliot's Debates, vol. 5, p. 487.) (See also on the general subject of the provisions relating to taxes on exports, Curtis' Const. Hist., vol. 1, 496, 504, 550.)

The character of State legislation prior to 1787, in reference to taxing exports, is illustrated by the statutes, reference to which follows:

Mercer's Abridgment of the Public Acts of Virginia, in force January 1, 1758.

32 Car. II (1680), c. 2.

> SEC. I. For every hogshead of tobacco exported, the exporter shall pay two shillings current money of England, and so for every five hundred pounds of tobacco exported in bulk, or otherwise, and so proportionably;

the same to be to the King, his heirs and successors.

* * * * *

IV. The said duty shall be paid for all tobacco shipped in this colony for exportation, though not made here.

IX. The duties aforesaid shall be paid to the several collectors and officers appointed to receive the same, for the uses and purposes mentioned in Section I.

Laws of Virginia, 1705 (Henning's Stat. at Large, vol. 3, 356), Chapter XXIX.

An act for laying an imposition upon skins and furs; for the better support of the College of William and Mary, in Virginia.

This act provided in substance—

I. There shall be satisfied and paid to her Majesty the following duties, customs, and imposts for the following goods, wares, and merchandises, which shall be exported and carried out of this her Majesty's dominion, either by land or water: For every raw hide, three pence; * * * for every dozen of raccoon skins, three pence, etc.

II. That the said duties, customs and imposts, shall be paid and satisfied by the person or persons exporting or carrying out the same, either by land or water, * * * before the said goods, wares, and merchandizes shall be shipped off, exported, or carried out of and from this dominion, either by land or by water; and a certificate thereof shall be obtained of the collector or collectors of the district where such goods,

wares, and merchandizes shall be exported or carried away, signifying the payment and satisfaction of such duties, customs and imposts, as aforesaid.

Statutes of South Carolina, vol. 2, 1682 to 1716, p. 64. (A. D. 1691.)

An act for laying a tax or duty on skins or furrs for the public use of this province and regulating the Indian trade.

This act provided that "a tax or duty be laid and leavyed on all skins and furrs exported from any part of this province;" and "if any skins or furrs whereof the duties aforesaid are or shall be due shall at any time after the ratification of this act be shipped or put into any boat or vessel to the intent to be carried into the parts beyond the seas or anywhere without the limitations of this Government, the duties due, or to be due for the same, not being paid," * * * all such skins and furrs so shipped shall be forfeited * * *.

It further provides that all merchants or other persons, before they have liberty to load any skins or furs on shipboard, shall make a written statement of their intent so to do and pay the duties to the officer designated.

Laws of Maryland, 1704. (Bacon's Laws of Maryland, 1704), chapter 27.

This act provided that no person inhabiting or residing within said province shall export any furs or skins without paying the several duties and imposts specified, and that all nonresidents that

shall export out of this province any such furs or skins shall pay double the duty appointed to be paid by persons inhabiting or residing therein. That any person exporting such furs shall at or before shipping on board any vessel in which they shall be exported render an account of the same to the proper officer. That any person, not being an inhabitant of the province, exporting therefrom any pork, beef, or bacon shall pay the imposts specified to the proper naval officers as in case of furs.

In *Brown* v. *Maryland* (12 Wheat., 444) Chief Justice Marshall said: "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited."

The terms "exports" and "articles exported," in construing constitutional provisions, have been constantly used by this court as interchangeable and as meaning the same thing.

Brown v. *Maryland*, 12 Wheat., 419.
Woodruff v. *Parham*, 8 Wall., 131.
License cases, 5 Wall., 462, 471.
Coe v. *Errol*, 116 U. S., 517.
Dooley v. *United States*, 183 U. S., 154.
Fairbanks v. *United States*, 181 U. S., 283.
Story on Constitution, sec. 1014.

Counsel for plaintiffs is in manifest conflict with the foregoing authorities and the opinions entertained by members of the Convention of 1787 in the conclusion which they announce as to the meaning of the words "articles exported," without citation of anything to sustain it, at page 19 of their brief, in the language following:

> It seems, therefore, that the words "articles exported," as used in section 9 of the Constitution, include any and all products which may at any time be exported, and relate to such products in their general character or condition before as well as after exportation has actually commenced; while the word "exports," as used in section 10, has a more limited significance, and relates not to the character of such products generally, but simply has reference to their character as exports, and at the time when and after exportation has actually commenced.

What is said in reference to the meaning and significance of the word "exports" in this quotation from counsels' brief is justified by the authorities upon the subject, and the terms "articles exported" mean the selfsame thing.

Counsel for plaintiffs appear likewise in conflict with the opinions of this court when they assume inferentially in the argument made on page 21 of their brief that the sole purpose of the restriction on the power of Congress contained in paragraph

5, section 9, Article I, of the Constitution, was to avoid unjust discrimination between the States by preventing the levy of a tax upon articles produced alone in one section, and in effect concludes that an excise tax on such articles would therefore be invalid.

In *Fairbank* v. *United States* (181 U. S., 283), replying to the argument that Congress was prohibited from laying a tax or duty on articles exported from any State in order alone to prevent inequality of taxation among the States, Justice Brewer said (p. 292):

> This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from

> the language of the clause itself, is reenforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue," but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

In *Knowlton* v. *Moore* (178 U. S., 41, 96, 106), the court clearly decided that the uniformity of excises contemplated by the Constitution had reference to a "geographical uniformity" and that the purpose was that such exactions should "operate generally throughout the United States," "that is, to be laid to the same amount on the same articles in each State."

Article I, section 8, of the Constitution, gives Congress power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

It is now well settled that the words "imports" and "exports," when they appear in the Constitution, apply only to articles brought from, or sent to, foreign countries, and are used solely in reference to foreign commerce.

Woodruff v. *Parham*, 8 Wall., 123.
Fairbanks v. *United States*, 181 U. S., 283.
Dooley v. *United States*, 183 U. S., 154, 162.

Every export, therefore, is an article of "commerce with foreign nations," and necessarily "articles exported from any State" are likewise of "commerce with foreign nations." Nothing can become an article exported from a State until it becomes a part of foreign commerce.

As to goods produced in any State and shipped out of the same, their destination determines whether they are articles of commerce with foreign nations or among the several States. Manifestly, such goods can not become articles of foreign commerce until all the conditions are fulfilled which would have been necessary to make them articles of commerce among the States, had their destination been to another State instead of abroad.

In *Coe* v. *Errol* (*supra*), which has been cited and approved time and again by this court, speaking in reference to logs cut in New Hampshire and lying on the bank of a stream awaiting shipment to Maine, Justice Bradley (p. 525) said:

> Such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of the property of that State, subject to its jurisdiction, and liable to taxation

> there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the State.

Nothing produced in any State can become an article of interstate commerce until committed to a common carrier for transportation out of the State, or until it has started on its ultimate passage to another State. The same rule—except as to destination only—must determine the moment when an article of foreign commerce becomes such.

In *Gibbons* v. *Ogden* (9 Wheat., 1–202) Mr. Chief Justice Marshall said:

> But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, can not be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose.

Turner v. *Maryland* (107 U. S., 38, 50).

The validity of certain inspection laws passed by the State of Maryland relating to tobacco were called in question. The general provision of the Maryland statute was that it should not be lawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which should have been inspected, passed, and marked.

Justice Blatchford, delivering the opinion of the court, among other things, said (p. 50):

> The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article.
>
> (P. 54) Objection is made that the Maryland laws are not inspection laws, but are regulations of commerce, because they require every hogshead of tobacco to be brought to a State tobacco warehouse. But we are of opinion that, it being lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article.

The fact that an article is manufactured for export does not make it an article of commerce. There is a clear distinction between manufacture and commerce.

In *Kidd* v. *Pearson* (128 U. S., 1, 20, 21, 22) Mr. Justice Lamar, delivering the unanimous opinion of the court (p. 20), said:

> No distinction is more popular to the common mind or more clearly expressed in economic and political literature than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball* (102 U. S., 691, 702), is as follows: "Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The

> result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management.
>
> It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details.

In *United States* v. *E. C. Knight Co.* (156 U. S., 1) the question involved was whether a monopoly of the business of manufacturing sugar was a restraint upon commerce and the court held that it was not. Chief Justice Fuller, delivering the opinion of the court (p. 12), said:

> Doubtless the power to control the manufacture of a given thing involves in a certain

> sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * * (p. 13). The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

The doctrine announced in *Kidd* v. *Pearson* and *United States* v. *Knight* (*supra*) is firmly established by the holdings of this court.

If the contention of counsel that a mere contract to manufacture and ship goods abroad, without more, converts them into exports be sustained, then the unfortunate results so forcibly expressed by Justice Lamar in *Kidd* v. *Pearson* must, at least in part, inevitably follow; and as the Constitution likewise prohibits the States from imposing imposts or duties on exports, they will no longer have the right to raise revenue by taxation upon articles manufactured under a contract for foreign delivery, and will be deprived of a source of revenue upon which they have always relied without question.

THE DEFENDANT IN ERROR RESPECTFULLY ASKS THAT THE JUDGMENT OF THE COURT BELOW BE IN ALL THINGS AFFIRMED.

JAMES C. MCREYNOLDS,
Assistant Attorney-General.

WASHINGTON, *January, 1904.*

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Supreme Court of the United States.

No. 118.—October Term, 1903.

C. W. Cornell and F. B. Cornell, Copartners, doing business under the name and style of Cornell Brothers, Plaintiffs in Error,
vs.
F. E. Coyne, late United States Collector of Internal Revenue, First District of Illinois.

In error to the Circuit Court of the United States for the Northern District of Illinois.

[February 23, 1904.]

On June 6, 1896, Congress passed an act, (29 Stat. 253,) entitled "An act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation and exportation of 'filled cheese.'" Section 2 defines "filled cheese." Section 3 directs that "manufacturers of filled cheese shall pay $400 for each and every factory per annum." Section 6 provides for the stamping and branding of the wooden packages in which manufacturers are required to pack filled cheese, and that "all sales or consignments made by manufacturers of filled cheese to wholesale dealers in filled cheese or to exporters of filled cheese shall be in original stamped packages." Sections 9 and 11 are as follows:

"Sec. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

"Sec. 11. That all filled cheese as herein defined imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal revenue tax of eight cents per pound, such tax to be represented by coupon stamps; and such imported filled cheese and the packages containing the same shall be stamped, marked and branded, as in the case of filled cheese manufactured in the United States."

Plaintiffs in error were manufacturers of filled cheese, entered into contracts for its manufacture and export, and under such contracts manufactured and exported 1,580,479 pounds of filled cheese. They were required by the defendant in error, as collector, to purchase and affix stamps to the exported packages of filled cheese. They protested against such required purchase, and applied to the Commissioner of Internal Revenue, as authorized by section 3226, Rev. Stat., for a return of the various sums so paid,

but their application was rejected. Thereupon they commenced this action in the Circuit Court of the United States for the Northern District of Illinois. In the declaration they alleged "that the requirements of the said defendant, whereby the plaintiffs were compelled in the manner aforesaid, to purchase and use the said revenue stamps, were wholly unauthorized and unwarranted by law; and that section 9, of the act of Congress aforesaid, and said act itself in that the same failed to contain provisions whereby filled cheese manufactured for export trade and exported and sold in foreign markets wholly without the United States, might be exported and sold free from the levy of any duty or tax thereon; or provision whereby the same might be freed from the force and effect of said act, are repugnant to said section 9, article I, of the Constitution of the United States, and that this suit, therefore, involves the construction or application of the Constitution of the United States."

A demurrer to the declaration was sustained. They elected to stand by the declaration. Judgment was entered in favor of the defendant, and thereupon this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

The contention is that inasmuch as this filled cheese was manufactured under contract for export, and was in fact exported, the tax of one cent per pound prescribed by section 9 was prohibited by the fifth paragraph of section 9, article I, of the Constitution, which reads: "No tax or duty shall be laid on articles exported from any State."

But this means that no burden shall be placed on exportation, and does not require that any bounty be given therefor. Congress has power to encourage exportation by remitting taxes on goods manufactured at home as it has power to encourage manufactures by duties on imports, yet the Constitution does not compel it to do either the one or the other. This power of encouraging is illustrated by section eleven of this act, which requires all imported filled cheese to pay, in addition to import duties, an internal revenue tax of eight cents a pound—eight times as much as that manufactured at home. To remit on articles exported the tax which is cast upon other like articles consumed at home, while perhaps not technically a bounty on exportation, has some of the elements thereof. By this act all filled cheese is subject to a manufacturing tax of one cent a pound. To remit that tax in favor of filled cheese exported may encourage the manufacturer to seek a foreign rather than a home market, but if the full tax on all filled cheese manufactured is required for the support of the government the remission of part necessitates revenue from some other source. Doubtless the remission is given in hope of widening the market and increasing the production, but that is only a possibility

of the future, while the loss in the revenue is a fact of the present. Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation. Such has been the ruling of this court. In *Turpin* v. *Burgess*, (117 U. S. 504, 506,) where the question was as to an export stamp tax on tobacco, Mr. Justice Bradley, speaking for the court, said:

"The constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, 'No tax or duty shall be laid on articles exported from any State.' (Art. I, sec. 9, par. 5.) In the other they are, 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' (Art. I, sec. 10, par. 2.) The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."

See also *Brown* v. *Houston*, (114 U. S. 622;) *Coe* v. *Errol*, (116 U. S. 517.)

Justice Miller, in his lectures on the Constitution (p. 592), says:

"The Congress of the United States, during the late civil war, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States,

it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol*, (116 U. S. 517,) and *Turpin* v. *Burgess*, (117 U. S. 504,) seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export."

Some light is thrown on this question by the cases of *Kidd* v. *Pearson*, (128 U. S. 1,) and *United States* v. *E. C. Knight Company*, (156 U. S. 1.) In the former a manufacturer of intoxicating liquors in Iowa claimed to be beyond the reach of the prohibitory law of the State on the ground that he manufactured only for exportation, and therefore as Congress had exclusive control over interstate commerce it had like control over the manufacture for interstate commerce. But this court, in an elaborate opinion by Mr. Justice Lamar, unanimously held against the contention, and decided that commerce did not commence until manufacture was finished, and that therefore the State was not prevented from exercising exclusive control over the manufacture. In the latter case the question was whether a monopoly of the business of manufacturing sugar within a State was a restraint of interstate commerce, and therefore within the purview of the act of Congress to protect trade and commerce against unlawful restraints and monopolies, (26 Stat. 209,) and it was held that it did not, Chief Justice Fuller announcing the opinion of the court, saying (pp. 12 and 13):

"Commerce succeeds to manufacture, and is not a part of it. . . . The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

There is nothing in the case of *Fairbank* v. *United States*, (181 U. S 283,) inconsistent with these views. There the question was as to the validity of a stamp tax on a foreign bill of lading, and it was held that it was a tax directly on the exportation. As said in the opinion with reference to the constitutional provision (p. 292): "The purpose of the restriction is that exportation, all exportation, shall be free from national burden." It is unnecessary to refer to the earlier legislation of Congress which, as shown by counsel for the government in his brief, has been in harmony with this construction. From what we have said it is clear that there is no constitutional objection to the imposition of the same manufacturing tax on filled cheese manufactured for export and, in fact, exported, as upon other filled cheese.

Although the only charge in the declaration and the only matter complained of in the assignments of error is the unconstitutionality of the act, and especially of section 9 thereof, in failing to contain provisions for the exportation of filled cheese free from the levy of any tax or duty, counsel

have in this court made a further contention that if the act be constitutional, it is because, properly construed, it does provide for exportation free from tax or duty. The argument is that the title of the act names as one of its purposes to regulate "exportation;" that while in the act there is no express provision for exportation, section 9, in reciting that "the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section," is to be construed as incorporating all provisions respecting stamps "relating to tobacco and snuff," including those for stamps on exports, which are issued free of charge.

Assuming, without deciding, that we may rightfully reverse the judgment of the Circuit Court for a failure to consider a question which was not presented, and that we may treat the declaration as amended so as to present this question, we are of opinion that the contention as to the construction of the act cannot be sustained. The title of an act is referred to only in cases of doubt or ambiguity.

"The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. (*United States* v. *Fisher*, 2 Cranch, 358, 386; *Yazoo & Mississippi Railroad* v. *Thomas*, 132 U. S. 174, 188.) The ambiguity must be in the context and not in the title to render the latter of any avail." (*United States* v. *Oregon &c. Railroad*, 164 U. S. 526, 541.) See also *Price* v. *Forrest*, (173 U. S. 410, 427,) and cases cited.

There is no doubt or ambiguity in the act. Section 9 explicitly declares "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof." And while the section contains a reference to existing laws governing the engraving, issuing, &c., of stamps relating to tobacco and snuff, that clause is a part of the sentence which provides that the tax levied by this section shall be represented by coupon stamps, and the existing laws governing the engraving, issuing, &c. of stamps are in terms "hereby made to apply to stamps provided for by this section" as far as applicable. In other words, the provisions of existing laws concerning the engraving, issuing, &c., of stamps are made applicable only to stamps representing taxes. There is neither directly nor indirectly any reference to stamps issued without cost to cover an exportation free from tax or duty. While in section 3 there is special reference by number to various sections of the Revised Statutes concerning special taxes, and they are made to extend so far as applicable to the taxes authorized by this act, there is nowhere any mention of section 3385, R. S., which provides for relieving exported manufactured tobacco and snuff from the manufacturing tax. Further, in section 6 it is directed that all sales to exporters of filled cheese shall

be in original stamped packages, and this direction is in the same sentence with that providing for sales to wholesale dealers. Clearly there is nothing in the body of the act exempting exported filled cheese from the ordinary manufacturing tax on other filled cheese. But if there were a doubt as to the meaning of the statute that doubt should be resolved in favor of the government. Whoever claims a privilege from the government should point to a statute which clearly indicates the purpose to grant the privilege.

"But if there be any doubt as to the proper construction of this statute, (and we think there is none,) then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor. (*Gildart* v. *Gladstone*, 12 East, 668, 675; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544; *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *The Binghamton Bridge*, 3 Wall. 51, 75; *Rice* v. *Railroad Co.*, 1 Black, 358, 380; *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Hannibal &c. Railroad Co.* v. *Packet Co.*, 125 U. S. 260, 271.)"

Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco and not in the case of exported filled cheese, is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. It is enough that no exemption has been made in favor of the latter.

The judgment of the Circuit Court was right, and it is

Affirmed.

Mr. Justice BROWN did not hear the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 118.—October Term, 1903.

C. W. Cornell and F. B. Cornell, Copartners, doing business under the name and style of Cornell Brothers, Plaintiffs in Error, *vs.* F. E. Coyne, late United States Collector of Internal Revenue, First District of Illinois.

In error to the Circuit Court of the United States for the Northern District of Illinois.

[February 23d 1904.]

Mr. Justice Harlan dissenting.

As this case went off upon demurrer by the Government to the declaration its material allegations must be taken as true. The case cannot properly be dealt with upon any other basis.

The declaration shows that the plaintiffs in error, who were plaintiffs below, were engaged in the business of manufacturing what is known in commercial circles as filled cheese; and that in execution of certain contracts made with foreign customers the plaintiffs manufactured large quantities of filled cheese, and shipped it by instalments, directly from their factory in Illinois to Liverpool and London. It alleged that "each quantity or instalment of filled cheese manufactured, exported and delivered by the plaintiffs under said contracts was forwarded by the plaintiffs *as soon as the same was ready for shipment from their factory* in said district, and *prior to the shipment thereof* the plaintiffs applied to the defendant as such collector for permission to ship and forward the same without purchasing, and attaching to said filled cheese or to the said packages containing the said filled cheese the revenue stamps required by an alleged act of Congress, approved June 6th A. D. 1896, with reference to internal revenues; but notwithstanding the fact that such filled cheese was *manufactured for export*, and was *about to be delivered by the plaintiffs for export and shipment to a foreign market*. . . the defendant did at various times during said period, and on the dates of shipment of said filled cheese, by force, duress, exact," &c.

Upon the occasion of each of the shipments the internal revenue collector exacted and collected (against the protest of the plaintiffs) a tax upon the cheese of one cent per pound, the collector insisting that such a tax was imposed by the act of Congress of June 6th 1896, entitled "An act defining cheese, and also imposing a tax upon and regulating

the manufacture, sale, importation and exportation of filled cheese." 29 *Stat.* 253, *c.* 237.

The first question to be considered is whether Congress intended by that act to impose a tax of one cent per pound upon filled cheese manufactured for exportation, and which, it is admitted, was in fact exported immediately after being so manufactured. Such is the case before the court for consideration.

The ninth section of the act of 1896, under which the collection proceeded, provides that "upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, *issue, sale,* accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section." § 9.

Observe that the section refers to "existing laws" relating, among other things, to the *issue* and *sale* of stamps for tobacco and snuff. That reference, I submit, embraced section 3385 of the Revised Statutes, Title, Internal Revenue, which provides: "Manufactured tobacco, snuff and cigars *intended for immediate exportation* may, after being properly inspected and branded, be removed from the manufactory in bond *without having affixed thereto the stamps indicating the payment of the tax thereon.* The removal of such tobacco, snuff and cigars from the manufactory shall be made under such regulations, and after making such entries, and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. There shall be affixed to each package of tobacco, snuff and cigars *intended for immediate export*, before it is removed from the manufactory, *an engraved stamp indicative of such intention.* Such stamp shall be provided and furnished to the several collectors as in the case of other stamps, and they shall account for the use of the same. When the manufacturer has made the proper entries, filed the bonds, and otherwise complied with the requirements of law and regulations as herein provided, the collector shall issue to him a permit for the removal, accurately describing the tobacco, snuff and cigars to be shipped, the number and kind of packages, the number of pounds, the amount of tax, the marks and brands, the State and collection district from which the same are shipped, the number of the manufactory and the manufacturer's name, *the port* from which the said tobacco, snuff and cigars are *to be exported*, the route or routes over which the same are to be sent to the port of shipment, and the name of the vessel or line by

which they are to be conveyed *to the foreign port.* The bonds required to be given for the *exportation* of the tobacco, snuff and cigars shall be canceled upon the presentation of the proper certificates that said tobacco, snuff and cigars have been landed *at any port without the jurisdiction of the United States, or upon satisfactory proof that after shipment the same were lost at sea.*"

It requires no argument to prove that, under that section, manufactured tobacco and snuff "intended for immediate exportation" could be exported without payment of any tax and without having affixed thereto any stamp other than "an engraved stamp indictative of such intention." The effect of the reference in the last clause of the ninth section of the act of 1896, to "existing laws governing the engraving, *issue, sale,* accountability, effacement and destruction of stamps relating to tobacco and snuff" was, I think, to incorporate into that act section 3385 of the Revised Statutes, so far as it could be made applicable to filled cheese, and to allow filled cheese *intended for immediate exportation* to be removed from the manufactory without payment of any tax, having affixed to it no other stamp than one engraved *and indicating the intention to export.* In that view, which seems to me incontestable, the purpose of Congress was to put manufactured filled cheese, intended for immediate exportation, upon the same footing as manufactured tobacco and snuff intended for immediate exportation and to permit its exportation without payment of any tax. Certainly section 3385 was one of the existing laws at the date of the passage of the act of 1896, and if applied to that act the result, I submit, must be as just stated. This question is within such narrow compass that it cannot be elucidated by extended discussion; and if the bare reading of the above statutes, all together, does not bring the mind to the conclusion indicated by me, argument to that end would be unavailing.

So I leave that question and come to the proposition that if the act of 1896 is to be construed as imposing a tax upon the plaintiffs' cheese, when about to be exported, then it is in conflict with the Constitution.

The eighth section of Article II of the Constitution enumerates certain powers which Congress may exercise, while the ninth section specifies certain things that Congress may not do. The express words of that instrument is that "no tax or duty shall be laid on articles exported from any State." Manifestly, so far as any prohibitory action by Congress is concerned, the object of that provision was to open the markets of the world to the products and manufactures of the several States, freed from any tax or burden whatever imposed by the United States. This court said in *Fairbank* v. *United States,* 181 *U. S.* 283, 292, that the "purpose of the restriction [on the power of Congress] is that exportation, *all* exportation, shall be free from national burden."

I do not contend that the owner of an article about to be exported could rightfully ship it to a foreign country, without paying such tax as had legally *attached* in favor of the Government *prior to the date on which the owner formed the purpose to export.* An existing property tax upon manufactured articles which had become a part of the general mass of property and was held in the possession of the owner for purposes of sale or use in this country, could not be defeated by reason of the fact that the owner—*subsequent to manufacture, and after a substantial interval of time*—formed the intention to export it. But that is not this case, although the court seems to treat it as if it were one of that kind. The Government admitted by its demurrer to the declaration that the filled cheese in question was manufactured for exportation; that upon the completion of the manufacture the plaintff as soon as it was ready for shipment from their factory set about to export it; and that it was ready to be delivered for such exportation, when the collector took the position that before it could be removed from his district and exported, the tax of one cent per pound, imposed by the ninth section of the act of 1896 "upon all filled cheese which shall be manufactured," must be paid. It is, in effect, admitted of record that the plaintiffs never had any other purpose than to export the cheese, as soon as manufactured, in fulfilment of contracts previously made with foreign customers, and that they promptly prepared it for exportation. There was no appreciable interval of time between the commencement of manufacture, and the preparation for exportation, when it could be reasonably said that the cheese had become a part of the general mass of property in the locality of its manufacture for purposes of sale, delivery, or consumption in this country. So that the question arises whether it is consistent with the constitutional injunction, "no tax or duty shall be laid on articles exported from any State," that *at the instant* when an article admittedly manufactured for exportation and is being prepared in good faith for exportation, not for sale or consumption here, that a national tax be laid on such article *as property.* If that question be answered in the affirmative, then the purpose of the constitutional restriction, that "all exportation shall be free from national burden," may be defeated; for if, in such circumstances as are disclosed in this case, Congress can impose a tax of one cent per pound on filled cheese, manufactured and intended for immediate exportation, and about to be exported, it can impose such taxes on articles manufactured in this country and intended for immediate exportation as will make it impossible for manufacturers to secure, or will deter them from attempting to secure, contracts with foreign consumers or buyers. The result would be that Congress, in time of peace, and by means of taxation, could bring about a condition of utter occlusion between the manufactures of this country and the markets of other countries. Indeed, the several States could bring about that result

by taxation; for if an article manufactured for exportation and which was prepared for exportation as soon as manufacture was completed, is not an *export* from the moment such preparation was begun, then a State may impose a tax upon it as *property* and compel the payment thereof before the article is removed from its limits for exportation. I do not think that the framers of the Constitution contemplated such a condition as possible.

In support of the views expressed in it the opinion reproduces the following observations by Mr. Justice Miller in one of his lectures on Constitutional Law (p. 592): "The Congress of the United States, during the late civil war, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was urged that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol*, 116 *U. S.* 517, and *Turpin* v. *Burgess*, 117 *U. S.* 504, seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or *its preparation for the voyage*, can be said to be an export."

I submit that these observations do not justify the conclusion announced by the court; for, the eminent jurist who made them says that property is to be deemed an export from the time it is in the actual process of exportation and "its preparation for the voyage" has begun. That is, in substance, the precise principle for which I am contending. Whilst the cheese was in the process of being manufactured, it was not of course a subject of taxation under the statute. It became manufactured filled cheese only when manufacture was completed. But, as soon as it was manufactured and prepared for shipment, and when it was about to be started on its journey to Europe, the collector exacted from the plaintiffs the property tax imposed by the act of 1896. In my judgment, within the meaning of the Constitution, and in every just sense, the cheese was in the actual process of exportation, and became an export from the moment when, *immediately after* the completion of manufacture, without loss of time, the plaintiffs, in good faith, prepared it for shipment in fulfillment of their contracts with foreign customers. In the *Fairbank case* the court held that a mere stamp tax on a bill of lading taken at the time articles were shipped from a State to a foreign country was a tax on the articles themselves as exports, and was forbidden by the constitutional provision that no tax or duty shall be laid on articles exported from any State. It is now held that

a tax on articles admittedly manufactured only for exportation and not for sale or consumption in this country, and which are exported as soon as they can be made ready for shipment, after the completion of manufacture, in execution of contracts entered into prior to the commencement of manufacture, is a tax on the articles themselves *as property* and not on them as exports. In short, the effect of the present decision is to say that, if Congress so wills, articles manufactured in this country, although manufactured only for exportation, and not for sale or consumption here, cannot be exported to other countries, except subject to such tax as Congress may chose to impose on the manufactured articles as property. Thus, despite the express prohibition of all taxes or duties upon articles exported from the States, Congress is recognized as having the same power over exports from the several States as it has exercised over imports from foreign countries. I do not think it has such power.

The views I have expressed are not in conflict with the judgment in *Turpin* v. *Burgess*, 117 *U. S.* 504, cited in the opinion of the court. That was not a case of a property tax upon a manufactured article intended for exportation, but a mere stamp tax imposed by the internal revenue law upon manufactured tobacco, and placed upon the tobacco in order to indicate the purpose to export it. The only issue was as to the validity of the statute imposing that stamp tax. There was nothing to show any purpose to export the goods immediately upon the completion of manufacture. The goods remained in the factory, and the court said that they "might never be exported," and "whether they would be or not would depend altogether on the will of the manufacturer." There was no showing of preparation for exportation as soon as such preparation could begin after manufacture. In the present case, as we have seen, it is admitted that the filled cheese was manufactured for exportation and was being prepared, immediately after manufacture, for exportation. The tax here was, in effect, collected while the cheese was being made ready for exportation, and therefore, to use the words of *Turpin* v. *Burgess*, whilst it "was being exported."

For the reasons stated, I am constrained to dissent from the opinion and judgment of the court.

I am authorized to say that the CHIEF JUSTICE concurs in this opinion.

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